THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION

BY

WARREN B. HUNTING

A DISSERTATION

Submitted to the Board of University Studies of The Johns Hopkins University in conformity with the Requirements for the degree of Doctor of Philosophy

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PREFACE

The general purpose of this study is the examination of the questions which have been decided by the Supreme Court of the United States in cases arising under that clause of Article I, section 10, of the United States Constitution which provides that "no States shall . . . pass any law impairing the obligation of contracts" (and which will, for convenience, be referred to, hereafter, as the "contracts clause"), in so far as these questions relate, in any way, to special privileges granted by the States. By "special privileges" reference is had to what are commonly known as "franchises," such as the privilege of being a corporation, the privileges of engaging in certain public service businesses such as that of common carriage, the privilege of exercising the state's power of eminent domain, the privilege of using the public streets and highways for tracks, pipes, wires, etc.; and also to those privileges which may be distinguished from "franchises" by the designation of "immunities," such as the immunity or exemption from taxation by the state, or from rate regulation. This use of these terms is adopted because it calls attention to an important distinction between the two kinds of privileges. The usage is not universal, however. Blackstone designates all special privileges by the general term "franchises."

A survey of the decisions will show that the questions arising in these cases, when viewed most broadly, divide themselves into two rather different fields of inquiry. The first field is concerned with the questions which are peculiar to the "contracts clause," *per se*—such as, What is a "contract"?—and which are fundamental to a true understanding of the clause. The second field is concerned with the construction of particular grants of privileges. Here the leading principle is the so-called doctrine of the strict con-

struction (in favor of the state) of state grants. It might be described as the general law of franchises and immunities, for it is a body of law whose characteristic rules are due, not to the "contracts clause" itself, but to the fact that the States have made certain peculiar grants or contracts which, because they have been made by States, are regarded and construed in a peculiar way. These rules might easily have arisen had there been no "contracts clause" in the Constitution. They would have arisen wherever franchises are regarded as legal interests to be protected by the courts from infringement by the Government, whether under the "due process of law clause" or some other similar constitutional provision or the ordinary law of the land.

In the first of the two fields of inquiry which we have noted it has been the especial endeavor to arrive at a true understanding of the principal conceptions underlying the "contracts clause" or, at least, of such of them as are necessarily involved in a consideration of the contracts of the States. This part of the study will include an examination of the much criticised Dartmouth College case and the hardly less criticised case of Fletcher v. Peck, with the purpose of determining the justice of these criticisms.

In the second field the special endeavor has been to discover the proper conception of the doctrine of strict construction, and to trace the application of that doctrine to the details of the various particular franchises which have been the subject of litigation with the purpose of stating, so far as possible, what the cases have actually decided, of testing the correctness of the application of the doctrine of strict construction to particular cases, and of tracing the fluctuations, if any there be, in the general attitude of the court towards this doctrine. This can be done the better inasmuch as the Supreme Court, in these cases, has generally confined itself to a reference to its own precedents, which thus have gradually worked themselves out into a more or less unified body of law.

A more detailed explanation of the field covered and its relation to the whole subject of the "contracts clause" will be found in the Introduction, which follows. It is not thought that the work done in the second field of inquiry, because it is confined to an examination of the decisions of the United States Supreme Court alone, will be lacking in practical utility, for it is only these decisions that can give an authoritative statement of the law of franchises and immunities as it will be applied by the federal courts when their aid is invoked for the protection of these grants, and they are asked to apply the prohibitions of the "contracts clause." In the second place, although the State courts are not bound to follow the decisions of the Supreme Court in so far as they may choose to give a greater protection to franchises, either by applying the "contracts clause" or some prohibition of the State constitution, than the Supreme Court has seen fit to do, nevertheless the State courts do regard the decisions of the Supreme Court in this class of cases with very great respect, and will generally follow them. Therefore the Supreme Court decisions are about the best source from which to discover what has been termed the general law of franchises and immunities; and because the "contracts clause," under the Constitution and the provisions of the United States statutes as to the judiciary, always gives the Supreme Court jurisdiction of these cases where the owner of the franchise is dissatisfied with the decision of the State court, a great many of them have, naturally, come before the court, thus securing a comprehensive and more or less unified character to its body of decisions on this subject.

The writer wishes to express his sense of indebtedness to Professor W. W. Willoughby, director of the Department of Political Science at the Johns Hopkins University, because it was through him that he was led to undertake this study, and more especially because it is his instruction and friendly counsel, very largely, that have enabled the writer to

obtain a conception of the methods and requirements of legal reasoning.

W. B. H.

Dr. Hunting was killed in France on July 15, 1918, while serving in the American army. He had intended to add to the study here published chapters dealing respectively with "Consideration," "Franchises under the Contracts Clause," "Charters," "Special Franchises," "Rate Privileges," "Tax Exemptions," "Effect of Sales, Mortgage Foreclosures, Reorganizations, Consolidation and Merger upon Franchises," and "The Effect of the Reserved Right to Alter, Amend or Repeal upon Charter Franchises and Privileges." Considerable progress had been made by Dr. Hunting upon these chapters, but the manuscript was not in a condition that justified its publication.

THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION

CHAPTER I

INTRODUCTION

The most fundamental of the questions arising out of the "contracts clause" are obviously these: (1) What is a "contract"? (2) What is the "obligation" of a "contract"? (3) What is a "law"? (4) What constitutes an "impairment"? A general view of the cases that have arisen under this clause suggests that the contracts which are sought to be protected under it may profitably be classified into contracts between private individuals, that is, private contracts, and contracts between a State and private individuals, or between two States, that is, State contracts. This classification is justified by the fact that the two kinds of contracts, generally speaking, do not both raise for solution the same fundamental inquiries, the nature of which we have already stated. And in the cases where they do raise the same fundamental inquiry, the principle for determining it is often different in the case of state contracts from what it is in the case of private contracts.

The purpose of this study is to cover those contracts of the States which confer special privileges, and which may be designated as "franchises" and "immunities," that is to say, the franchise is to be a corporation, and franchises to engage in public services such as railroad, street railway and telegraph franchises, ferry and bridge franchises, water and gas franchises, franchises to use the streets of a city for gas and water pipes and street railways, and finally, because they are of somewhat the same nature as these fran-

chises, rate privileges and tax exemptions. This study, therefore, omits from the field of state contracts those cases which have dealt with contracts contained in state securities—that they should be receivable in payment of taxes and the like,—land grants by the States, and cases of contracts between the States, or between a State and the United States.

The first question to be considered is the power of the States to obligate themselves by contract. This involves first a consideration of the meaning of the terms "obligation" and "contract," viewed as technical legal concepts, and then a consideration of their meaning when viewed in the light of the circumstances surrounding the adoption of the "contracts clause." It involves also the more specific questions, whether a grant is a contract and whether a charter of incorporation is a contract. It will then be considered whether or not a consideration is required for the validity of the contracts of the States, and if so, what constitutes a consideration.

As the obligation of a contract, generally speaking, has been held to be that which a party is obligated to do, according to the law of the State wherein the contract was made and as prescribed by that law at the time the contract was so made, it is obvious that in these cases the federal courts, when they seek to determine what the obligation of a particular contract is, are called upon to determine a question of state law. Moreover, as regards contracts made by the state which can, of course, only be made by law, as the state can only act through law,[1] the legislature must be authorized by the state constitution to make the contract, and must enter into a contract by means of a legislative act, and any inferior body must likewise obtain authority from the legislature, before it can enter into contracts on behalf of the state. In these cases, therefore, the federal courts not only have to determine a question of state law, but a question of state constitutional or statutory law. Some consideration,

[1] W. W. Willoughby, The Nature of the State, pp. 195, 221.

therefore, is necessary of the relations between the state and federal courts in cases of this kind, and the respect paid by the federal courts to the decisions of the state courts.

The obligation of a contract is, of course, chiefly determined by the language of the particular contract in question, and the courts must necessarily interpret this language for themselves, so that, in many cases, perhaps in the greater part of those here reviewed, the court is engaged simply in construing the language of particular contracts. It is doing what any state court might have to do, under the ordinary law or under provisions in the state constitution, and which the Supreme Court itself might have had to do under the "due process clause" of the federal Constitution, as well as under the "contracts clause." As one of the parties to these contracts is a State, however, a new aspect is put upon the question; the contract is no longer construed by the ordinary rules; it is interpreted in the light of a special canon of construction that has been adopted by the courts, namely, that all such contracts are to be construed strictly against the grantee and in favor of the State. The general nature of this doctrine of strict construction must therefore be considered, and this will be followed by chapters upon charters, special franchises, rate privileges and tax exemptions, all of which will be chiefly taken up with tracing the application of this doctrine to the facts of particular cases.

The effect of mortgage foreclosures, consolidations, mergers, sales and reorganizations of corporations is included in the study, first, because no opinion can be given upon the question whether a corporation has or has not the privileges which belonged to its predecessor corporation unless one is familiar with the peculiar rules of law applicable to these transactions; secondly, because these rules very largely result from an application of the doctrine of strict construction.

The subject of the effect of the reserved right to alter, amend or repeal charters, franchises and immunities is also

treated, inasmuch as this is now one of the most important phases of the law dealing with these special privileges. It may probably be said, also, that the cases on this subject involve, theoretically at any rate, an application of the prohibition of the "contracts clause."

It was intended to add chapters dealing with the police power as affecting franchise and immunities, with the question what is an "impairment," and the question what is a "law," but these, owing to lack of time to complete them, have been omitted.

CHAPTER II

The Meaning of "Obligation of Contracts" Considered

It was stated in the preceding chapter that the questions arising out of the "contracts clause" might be analyzed, in a general and abstract way, into: what is a "contract"? what is its "obligation"? what is a "law"? and what constitutes an "impairment"? Within the first two of these inquiries have fallen the most important particular questions which have arisen over the "contracts clause"—the questions which have aroused the most discussion and have given rise to the most celebrated cases. These are: whether a grant or executed contract is a "contract" and gives rise to an "obligation"; whether a state can "contract" and be under an "obligation" thereby; whether a charter of incorporation can be said to be a "contract"; whether the "obligation of contracts" is derived from natural or from positive law—a pertinent question in determining whether the "obligation" of a "contract" can be prospectively impaired, or only retrospectively; finally, whether the remedy for the enforcement of a "contract," which is in force at the time of its making, is a part of the "obligation."

The last of these questions falls rather within the domain of private contracts, or contracts between individuals, than within the domain of state contracts, and so does not especially concern us, but the first four are all involved in a consideration of the contracts of states, and therefore demand our attention. Of course, these questions have long since been answered in leading cases that settle the law upon the points involved. A review of the first eight cases decided by the court, wherein the "contracts clause" was applied, will give the answers to the questions which we have put.

They are taken in their chronological order so as to show the way in which the law actually developed.

In 1810 in Fletcher v. Peck,[1] it was held that a grant of land was a contract, and that a State was as much obligated by its grant of land as an individual by his. A statute repealing the grant was, therefore, held to impair the obligation of a contract.

In 1812 in New Jersey v. Wilson,[2] it was held that an agreement providing for exemption from taxation, made with the Indians by the State of New Jersey in connection with a tract of land granted them in consideration of a surrender by them of their claims to other tracts of land, was a contract protected by the "contracts clause."

In 1819 in the case of Sturges v. Crowninshield,[3] it was held that a state bankruptcy law impaired the obligation of contracts which had been made prior to its enactment.[6] It was not necessary to determine whether the obligation of the contract was created by positive or by natural law.

In the very next case, however, McMillan v. McNeill,[4] Marshall, speaking for the court, did hold an insolvent law to constitute an impairment of the obligation of a contract made subsequent to its enactment, stating that the case could not be distinguished from that of Sturges v. Crowninshield. This holding of Marshall's was later explained away, upon the ground that the insolvent law there involved was that of Louisiana, while the contract was made in South Carolina, and hence was not subject to the law of Louisiana in so far as its essential validity and its obligation were concerned.

In the same year, 1819, the case of Trustees of Dartmouth College v. Woodward[5] was decided. This case held that the charter incorporating Dartmouth College, granted by the Crown in the year 1769, constituted a contract with

[1] 6 Cranch, 87.
[2] 7 Cranch, 164.
[3] 4 Wheat. 122.
[4] 4 Wheat. 209—1819.
[5] 4 Wheat. 518.

the English state the obligation of which passed to the State of New Hampshire upon her severance from England, and came under the protection of the United States Constitution when she became a member of the Union. The case has always been regarded as establishing the doctrine that all charters of private corporations are contracts.

In Owings v. Speed[6] it was held that the "contracts clause" did not operate to invalidate a law passed prior to the going into effect of the Constitution.

In Farmers' and Mechanics' Bank v. Smith[7] the principle of Sturges v. Crowninshield was reaffirmed.

In 1823 in Green v. Biddle[8] it was held that a contract between two of the States of the Union was within the protection of the "contracts clause" equally with a contract between two individuals, or a State and an individual.

In 1827 in Ogden v. Saunders[9] it was held that a state insolvency law could not be considered as operating as an impairment of the obligation of contracts entered into subsequently to its enactment. The majority judges delivered separate opinions, the reasoning of which—each judge looking at the question from a slightly different point of view—is difficult to harmonize. It is probably true, however, that they all essentially agreed on the proposition that the obligation of a contract made within a sovereign state, must be precisely that allowed by the law of the state and none other. This case contains the best discussion to be found in the reports as to what is the meaning of the words "obligation" and "contracts" as found in the Constitution.

In the light of these adjudications it might seem that further discussion of these questions would be useless. However, the first and fifth of these decisions, particularly, have been very much criticised. It has been said that Chief Justice Marshall was wrong both in the decision that a grant was a contract and in holding that a charter of

[6] 5 Wheat. 420—1820.
[7] 6 Wheat. 131—1821.
[8] 8 Wheat. 1.
[9] 12 Wheat. 213.

incorporation was a contract; that the first decision was made in a friendly suit, manufactured for the purpose of obtaining a ruling; and that, in the second, the court was led astray by the persuasive eloquence of Daniel Webster, combined with the weakness of the opposing counsel, and the employment by Webster and his associates of influence other than that of argument in open court. It has also been said that the "contracts clause" was never intended to apply to the contracts of the States.[10]

Because it is believed that it is a matter of some interest to determine whether these foundation principles of our constitutional jurisprudence are fundamentally wrong or not, and that it is possibly a matter of present importance, in so far as the tendency to a gradual warping away from these principles is increased, if the belief is general that they were wrongly decided, we shall undertake an examination of the *ratio decidendi* of these decisions in order to determine the justice of the criticisms which have been made upon them. It is believed, also, that such an examination will bring out the fundamental conceptions involved in this clause more clearly than it is possible to do in any other way.

For the purposes of the following discussion we shall

[10] The most elaborate criticism of the Dartmouth College Case is to be found in John M. Shirley's "The Dartmouth College Causes," a book devoted exclusively to that purpose. The number of critics is swelled, however, by such writers as the late Chief Justice Doe of New Hampshire, writing in 6 Harvard Law Rev. 161, 213; Clement H. Hill in 8 Am. Law Rev. 198 (perhaps the strongest criticism that has been made); and numerous others, among which may be mentioned the anonymous writer in 28 Am. Law Rev. 440; J. F. Orton in the Independent, Aug. 19 and 26, 1909; J. P. Cotton, Jr., in his edition of Marshall's decisions. On p. 347 Cotton says: "One rises from the opinion dissatisfied—there is bias in the statement of facts, bias in the statement of premises, and the assumption that the charter was a contract is too hasty and too barely supported." Adverse judgments are expressed by Prof. Jeremiah Smith in John Marshall, ed. by Dillon, vol. i, pp. 154–155, 370; by Morawetz in his work on Corporations, 2d ed., sec. 1045, p. 1005. Henry Cabot Lodge, in his life of Daniel Webster, expresses the opinion that the decision was due to Webster's skillful presentation of the political aspects of the case so as to arouse within Marshall a belief that the principles of Federalism were menaced. See, to the same effect, 28 Am. Law Rev. 356.

need to premise only two or three of the ordinary rules of statutory and constitutional construction which, we assume, any person who endeavors to ascertain the true meaning of the "contracts clause" would have to follow, namely: that the words and phrases of the clause should be given their ordinary meaning; that since it is quite apparent that the clause is dealing with a technical, legal subject matter, its terms should be interpreted in the light of their technical or legal meaning, which would be, presumptively, the meaning given to them by the common law; finally, that the court must look to the general opinion current at the time of the adoption of the Constitution, and at all facts and circumstances shedding light on that opinion, in order to determine whether the technical meaning of the language used should be either restricted or enlarged.

With this preface, we shall begin with the first question that was presented to the court, that is, whether a grant was a "contract" with an "obligation" within the meaning of the "contracts clause."

Is a Grant a Contract?

In answering this question we must consider, to some extent, what was meant by "contracts" and what was considered to be their "obligation." And perhaps the best way to approach the subject is by considering the views of modern jurists as to the conceptions included in these terms.

First, as to obligation: this term originated in the Roman law, and was a fundamental conception of that law, as it has been and still is of the civil law. The excellent explanation given by Salmond is quoted in the notes, where it may be referred to,[11] but for our present purpose his short

[11] Salmond, Jurisprudence, sec. 165, p. 428: "Obligation, in its popular sense is merely a synonym for duty. Its legal sense, derived from Roman law, differs from this in several respects. In the first place, obligations are merely one class of duties, namely those which are the correlatives of rights *in personam*. An obligation is the *vinculum juris*, or bond of legal necessity which binds together two or more determinate individuals. It includes, for example, the duty to pay a debt, to perform a contract, or to pay damages for a tort

definition is sufficient. He says: "An obligation, therefore, may be defined as a proprietary right *in personam* or a duty which corresponds to such a right." Disregarding the qualification of "proprietary" which is immaterial to our present purpose, it will be noted that an obligation is a legal relationship between two persons, involving a right on one side and a duty on the other (though the duty is often the only part of the relation referred to as the "obligation"), and that this duty is one *in personam*, that is, it is a particular duty owed to the other party to the relationship, such as a promise to pay money, and is contradistinguished from a common duty which all alike owe, such as the duty of refraining from interfering with a person's rights over the property which he owns. The obligation, being a legal relationship, is necessarily a creature of law. Of course certain acts are the occasions of the arising of obligations, but such acts cannot truly be said to create them.[12] This conception is that which modern jurists, equally with the jurists of Rome, attribute to the term obligation.

As to contract: Savigny defined a contract as "the concurrence of several persons in a declaration of intention whereby their legal relations are determined."[13] According to this definition, it will be noticed, a conveyance would constitute a contract since, in a conveyance, the legal relations of the two parties are determined by a concurrence of the wills of the parties; and it is for this reason that Markby criticises Savigny's definition,[14] claiming that he thereby loses sight of the fundamental distinction between a conveyance and a contract, which Austin so laboriously insisted

but not the duty to refrain from interference with the person, property or reputation of others. Secondly, the term obligation is in law the name not merely of the duty but also of the correlative right. . . . Thirdly, and lastly, all obligations pertain to the sphere of proprietary rights. . . . An obligation therefore may be defined as a proprietary right in personam or a duty which corresponds to such a right."

[12] Markby, Elements of Law, sec. 603, p. 298.

[13] Savigny, Treatise on Roman Law, 2d French ed., Paris, 1856, vol. iii, p. 314; see also Markby, sec. 608.

[14] Markby, secs. 609-610.

upon. He thinks it unimpeachable as a definition of "agreement," but would limit the term contract to those agreements which involve a promise to do or forbear from some future act. In other words, he would limit the idea of contract to agreements by which obligations are occasioned between the parties. The dispute is, to a certain extent, one of nomenclature, for Savigny made a division of contracts into two classes, obligatory and not obligatory. What Markby calls a contract, he calls an "obligatory contract," that is, a contract which occasions an obligation between the parties.[15] Savigny's conception of an obligatory contract is that which most of the English jurists term a contract. Thus Anson says: "Contract is that form of agreement which directly contemplates and creates an obligation."[16] According to Salmond, "A contract is an agreement which creates an obligation or right *in personam* between the parties."[17] When Pollock says, "a contract is an agreement and promise enforceable by law,"[18] the idea that the agreement contemplates and effects an obligation is conveyed by the added words "and promise." Salmond criticises this definition on the ground that certain agreements occasion legal relations which may be termed contracts, although they are not enforceable, for example, voidable and illegal contracts—but into this question it is not necessary to enter. Holland accepts Savigny's wide use of the word contract, distinguishing, however, between the wider and narrower senses of the term.[19]

It is, therefore, clear that, although these jurists differ upon the question whether or not a conveyance should prop-

[15] Savigny. See, for example, p. 317, where he says: "If one misconceives the contractual nature of these numerous and important acts, it is because he fails to distinguish from them the obligatory contract which ordinarily precedes and accompanies them. Thus, for example, in the sale of a house, attention is called, and rightly, to the obligatory contract of sale, but it is forgotten that the subsequent 'tradition' is a contract at the same time entirely apart from this sale, although necessitated by it."

[16] Anson, Contracts, 11th ed., p. 2.

[17] Salmond, sec. 123, p. 313.

[18] Pollock, Contracts, p. 2.

[19] Holland, Jurisprudence, 10th ed., pp. 209, 249.

erly be termed a contract, they all agree that a conveyance, whether contract or not, does not give rise to any obligation. The English jurists, indeed, have laid great stress upon the point. Austin insisted upon the distinction with his characteristic vigor, and Markby, Holland and Salmond have all followed him. So also have Anson and Pollock in their authoritative treatises on the law of contracts. Anson says, speaking of agreements, and meaning thereby a concurrence of the will of two or more persons whereby their legal relations are determined: "But agreement as thus defined seems to be a wider term than contract. It includes legal transactions of two kinds besides those which we ordinarily term contracts. These are: (1) Agreements the effect of which is concluded so soon as the parties thereto have expressed their common consent in such manner as the law requires. Such are conveyances and gifts wherein the agreement of the parties at once effects a transfer of rights *in rem*, and leaves no obligation subsisting between them."[20] Sir Frederick Pollock expresses the same idea when he says: "A consideration, properly speaking, can be given only for a promise. Where performance on both sides is simultaneous, there may be agreement in the wider sense, but there is no obligation and no contract."[21]

The manner in which this result is reached will clearly appear if we glance over the fundamental doctrines which these jurists propound. The content of a legal right is "a capacity residing in one man of controlling . . . the actions of others." This capacity is given by the state to the possessor of the right. The state is the creator and recognizer of rights. And this is the principle upon which it creates or recognizes rights or the transference of them: "The origination, transfer and extinction of rights . . . are due to Facts, i.e., either an Event or an Act."[22] A Juristic Act is defined as "a manifestation of the will of a private

[20] Anson on Contracts, p. 3.
[21] Pollock on Contracts, 7th Eng. ed., p. 167. See also Holland, pp. 248–249.
[22] Holland, p. 151.

individual directed to the origin, termination or alteration of rights."[23] Another name for Juristic Act, and one which shows its nature very clearly, is Act in the Law. Further, "Juristic Acts are distinguished into 'one-sided,' where the will of only one party is active, as in making a will, accepting an inheritance, or taking seisin; and 'two-sided,' where there is a concurrence of two or more wills to produce the effect of the act, which is thus a 'contract' in the widest sense of that term."[24] In other words, the theory seems to be that rights are created and transferred, but always by the state. The state takes cognizance of certain phenomena, upon the appearance of which it declares rights to exist or to inhere in certain persons. A contract or agreement between two persons is simply one of these phenomena. When "A" enters into an agreement whereby he gives his chattels or his land to "B" and agrees that "B" shall have them, "B" acquires rights in the transferred property, not because "A" gave them to him, but because the law declares that he shall have them. The law terminates "A's" rights and originates "B's."[25] There is no obligation, no subsisting legal relation arising out of the transaction.[26]

This analysis of the operation and effect of a conveyance seems strange, at first glance, because of the extent to which it minimizes the part played by the grantor in the transaction. One naturally feels that the grantee acquires his right because the grantor gives it to him. In other words, the grantor had a right to possess and control the thing; he had a right, likewise, to give it away. Yet, if one pushes the analysis a little farther along this line, he might without much difficulty arrive at the conclusion that the absolute

[23] Ibid., p. 112.
[24] Ibid., p. 118.
[25] Ibid., p. 153.
[26] It is difficult to understand what Holland means by the following note, which is found on page 153: "Puchta, Inst. II, p. 325, points out that in all derivative acquisitions there is a legal relation between the *auctor* and the person acquiring; not merely a loss by one and a gain to another as in *usucapio*."

owner and possessor of a right can not really divest himself of it, but that the most he can do is to agree to allow another person to exercise possession and control over the thing, and to agree not thereafter to assert his own rights, as against such person. We would say, however, that we do not believe that the natural, or ordinary, practical view of the transaction—which we have already vouched as authority for questioning the view that the whole force of a conveyance is derived from the law alone—would reach to the other logical extreme of holding that the donor's power is so absolute that he cannot divest himself of it. The practical view would rather be, it seems to us, that the grantee derives his right from the consent of the grantor, and yet that, once the grantor has completed the formalities evidencing that consent, all his right and power has become extinguished, and he is not, therefore, under any further and subsisting obligation towards his grantee.

Turning next to Fletcher v. Peck, it is noticeable that both Chief Justice Marshall, delivering the opinion of the majority of the court, and Justice Johnson, dissenting, adopt the general conception, which we have heretofore given, of the term obligation. It is only when they come to apply that conception to the case of a conveyance that they are unable to agree. What we have termed the practical view, and what is, when elaborated and fitted into a system, the view of the modern jurists, was stated very clearly, in that case, by Justice Johnson in his dissenting opinion. He said:

> Whether the words "acts impairing the obligation of contracts" can be construed to have the same force as must have been given to the words obligation and *effect* of contracts is the difficulty in my mind.
>
> There can be no solid objection to adopting the definition of the word "contract" given by Blackstone. The etymology, the classical signification and the civil law idea of the word will all support it. But the difficulty arises on the word "obligation" which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.[27]

[27] 6 Cranch 78, 144.

Marshall answered the argument in this manner:

A contract is a compact between two or more persons and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing, such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed, and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.[28]

Thus Marshall gave to the word obligation the general meaning which, we have seen, Roman, civilian, and modern jurists all attribute to it. He recognized it essentially as "a tie, whereby one person is bound to perform some act for the benefit of another."[29] He sought to point out what it was that the grantor in a conveyance was still bound to do, or rather to refrain from doing, after the act of conveyance had been performed. Was he correct, then, in saying that every grant implies a contract not to reassert the right which has been granted?

When we ask, Was he correct? we mean, Was he justified by authority? And the first authority to which we shall turn will be the writers upon the general jurisprudence of that time. It seems to us that it must be borne in mind, in any consideration of the early cases construing the "contracts clause," that the phrase "obligation of contracts" was foreign to the common law, but that it was a term and conception in general use in the Roman and civil law and

[28] 6 Cranch, 78, 136.
[29] This is the definition of Holland, p. 236.

in the so-called law of nature; and, finally, that the principles of this law of nature constituted the generally accepted philosophy of law of that day.[30]

It is a reasonable presumption that the writers upon natural law would tend to regard a conveyance of property as a contract. In developing a theory of property, these jurists usually started with some such general proposition as that all things were originally owned in common. This gave each man a natural and inherent right in the world's wealth. The general mass of property was then usually regarded as having been divided up by an agreement or contract between every one, each renouncing his right in the property which was thereafter to be owned in severalty by each of the others. This plainly partakes of the nature of an obligatory contract. The more so because, philosophically viewed, one can not, of his own act, totally divest himself of a right which is absolutely his. And, in any event, the one and only element of the conveyance, according to natural law, was the consent of the parties. Or, if they started with the premise that no man had any right of property at all, they then derived the right of property from a general contract whereby each agreed not to interfere with the enjoyment of the others in the specific pieces so allotted to each. Here, also, is plainly an obligatory con-

[30] How generally accepted it was we shall show in more detail hereafter. We shall also show that Marshall accepted the doctrine, and that his construction of the "contracts clause" was always based upon this "natural law" conception of obligation and contract. It will hardly be disputed that, in deciding Fletcher v. Peck, it would have been quite proper to have adverted to the writers upon natural law to see what light they were able to shed upon the question whether or not a conveyance was a contract and involved a subsisting obligation. The arguments in Fletcher v. Peck are not reported. It was not the custom then, we believe, to file printed briefs. Arguments were confined to those made orally in court, of which the judges took notes. Although, therefore, it is not certain that civil or natural law precedents were referred to in that case, it is extremely probable that such was the fact, in view of the eminence of the counsel—J. Q. Adams and Joseph Story on one side and Luther Martin on the other—and in view of a reference to civil law doctrines which Justice Johnson made in his dissenting opinion.

tract. The transferring of the right, thereafter, would seem to partake of much the same nature.

In confirmation of the foregoing statements regarding the views of the writers upon natural law, we may cite Pufendorf. This writer holds that certain obligations are, by the law of nature, born with men; but that all other obligations, which he terms "adventitious" obligations, "proceed from a simple, or from a mutual act, of which the former is properly called a *free grant* or *promise*, the latter a *pact* or *covenant*." Regarding promises and pacts or covenants, he says:[31]

> But inasmuch as all acknowledge that promises and pacts do transfer a right to others, before we proceed, it may not be improper to examine Hobbes's opinion about the transferring of right. He then, from his project of a state of nature, having inferred, that every man hath naturally a right to everything, and having farther shown, that from the exercise of the right there must needs arise a war of every man against every man, a state very unfit for the preservation of mankind, he concludes, "That whilst reason commands men to pass out of this state of war, into a condition of peace, which peace is consistent with a right of every man to every thing, it at the same time prescribes that men should lay down some part of this universal right." "A man," he says, "may lay down, or divest himself, of his right in two ways, either by simply renouncing it, or by transferring it to another. The former is done, if he declares by sufficient signs, that he is content it shall hereafter be unlawful for him to do a certain thing, which before he might have lawfully done. The latter if he declare by sufficient signs to another person, who is willing to receive such a right from him, that he consents it shall be for the future, as unlawful for himself to resist him in the doing of a certain thing, as he might before have justly resisted him." Hence he infers that the transferring of right consists purely in non-resistance; or that, he who in a state of nature transfers a right to another does not give the other party a new right which before he wanted, but only abandons his own right of resisting such a person in the exercise of his.

Pufendorf takes issue with this explanation to this extent. He maintains that in a state of nature man has powers only and not rights, "for 'tis ridiculous trifling to call that power a right, which should we attempt to exer-

[31] Pufendorf, Law of Nature and Nations, with notes by Barbeyrac, translated by Kennett, 4th ed., 1729; Book 3, chap. v, secs. 1 and 2, p. 259.

cise, all other men have an equal right to obstruct or prevent us." He then continues:[32]

> Thus much then we allow, that every man has naturally a power or license of applying to his use, any thing that is destitute of sense or reason. But we deny that this power can be called a right, both because there is not inherent in those creatures any obligation to yield themselves unto man's service; and likewise because men being naturally equal, one cannot fairly exclude the rest from possessing any such advantages unless by their consent, either express or presumptive, he has obtained the peculiar and sole enjoyment of it. . . . A man then acquires an original right over things, when all others either expressly or tacitly renounce their liberty of using such a thing, which before they enjoyed in common with him. This original right being once established, by virtue of which the primitive community of things was taken off, the transferring of right is nothing else but the passing it away from one to another, who before was not master of it. Hence appears the absurdity of saying, that the transferring of right consists barely in non-resistance. Inasmuch as that negative term *cannot express the force of the obligation arising from such an act;*[33] which properly implies an inward inclination to make good the contract. Though non-resistance be indeed one consequence of the obligation, and without which it cannot be fulfilled. . . . He [Hobbes] ought indeed to have expressed himself thus: Since in a state of mere nature things belonged no more to one than to another, therefore if a particular person desired the sole use of anything, to make him master of his wish, it was necessary that all other men should renounce the use of the same thing. If they did this gratis, the act had somewhat in it like a gift; if with some burden, or under some condition, it was then a kind of contract, for which we have no name. But should one man have renounced his power over such a thing, this could have been no prejudice to others, and consequently he only would have been debarred from the use of it, who had thus freely quitted all title to it.

It would seem correct to say that both Pufendorf and Hobbes regarded a conveyance as essentially a contract with a subsisting obligation. Hobbes' "renunciation" is clearly a contract, and Pufendorf's chief objection is that Hobbes makes the "obligation" of the transaction merely a passive one. It being established that an obligation arises out of the transaction, the fact that Pufendorf calls those conveyances which are made gratis gifts, and those made with a burden or condition contracts, is of little moment. This is simply due to his peculiar use of the word "contracts." All alienation, he elsewhere states, is effected through the con-

[32] Ibid., pp. 260-261.
[33] Italics ours.

currence of the will of both the grantor and the grantee,[34] which is a pact. In the ordinary acceptation of the term this would be a contract. It would clearly be a contract at common law, whose broad definition of contract, waiving the requirement of consideration, was: "An agreement of two or more persons to do or not to do a particular thing."[35] Pufendorf's distinction between pacts and contracts was certainly not the generally accepted one among writers upon the law of nature. Barbeyrac says that he derived it from some of the Roman law authorities.[36]

Kent,[37] in his commentaries, writing in the year 1827, says:

> There has been much discussion among the writers on the civil law, whether a gift was not properly a contract, inasmuch as it is not perfect without delivery and acceptance, which imply a convention between the parties. In the opinion of Toullier every gift is a contract, for it is founded on agreement, while on the other hand Pufendorf had excluded it from the class of contracts out of defererence to the Roman lawyers, who restrained the definition of a contract to engagements resulting from negotiation. Barbeyrac, in his notes to Pufendorf, insists that, upon principles of natural law, a gift *inter vivos*, and which ordinarily is expressed by the simple term gift, is a true contract, for the donor irrevocably divests himself of the right to a thing and transfers it gratuitously to another, who accepts it, and which acceptance, he rationally contends, to be necessary to the validity of the transfer. The English law does not

[34] Pufendorf, Book 4, chap. ix, sec. 1, p. 413: "Now as the conveyance of rights is transacted between two parties, the one from whom, and the other to whom they pass, so in those methods of acquisition which flow from the force and virtue of property the concurrence of two wills is required, the giver's and the receiver's."

[35] 2 Kent's Coms. 450; 2 Blackstone's Coms. 442.

[36] See Pufendorf, Book 5, chap. i, sec. 4, p. 473, and Barbeyrac's note 1 to Book 5, chap. iv, sec. 1, p. 80. Pufendorf says: "In my opinion the difference between pact and contract may be best taken from the object, so as to call that contract which concerns those things and actions which are the subject of traffic and so presuppose property and price; and that pact by which we covenant about other things. By this means pact, strictly speaking, will take in all negative agreements, by which we covenant not to do, or not to demand, what otherwise we might do or demand; as also those agreements that have for their object the exercise of our natural faculties, so far as they hereby tend to the promoting of mutual profit and advantage, considered merely by themselves without any regard to price, or any valuable consideration, in a word, when we agree to do some work that is not mercenary."

[37] 2 Kent's Coms. 438.

consider a gift, strictly speaking, in the light of a contract, because it is voluntary and without consideration, whereas a contract is defined to be an agreement upon sufficient consideration to do or not to do a particular thing.

Although called "civil law" writers, Pufendorf and Barbeyrac were, as we have seen, writers on the law of nature, and it was in treating of the law of nature that they discussed the nature of the transfer of rights. Pufendorf, we have further seen, seems to attribute to a conveyance all the elements of a contract except the name, and particularly that element which Chancellor Kent does not take into consideration at all, that element which was specifically required if the contract was to come within the operation of the "contracts clause," namely, the element of obligation. Toullier on the other hand, was apparently a writer on the civil law in the strict sense, and to the discussion of the civil law doctrines, which follows, he may, therefore, be added, upon the authority of Kent, as a writer who held that a conveyance was a contract. Austin in his Lectures on Jurisprudence, and particularly in several of the notes that have been appended to them, discoursed at some length upon the theories of contract and conveyance held by the writers on the civil law, and it is upon this explanation of the civil law that our discussion will be based.

The civil law's manner of dealing with this question was very unsatisfactory to Austin's logical mind, and he criticised it with much vigor. The civil law doctrine may be summarized in the language of Amos.[38] After describing the ceremonies of *tradition* and *mancipation,* he continues:

Most of the acts above exemplified, and the kinds of intentional transfer they represent, follow upon previous mutual promises and arrangements between the old and the new owner. This has led to an erroneous notion which has deeply coloured the history of Roman law in the Middle Ages, and which reappears in most European Codes, to the effect that all rights of ownership whatever are of necessity preceded by a contract, or at least an obligation arising out of a contract or a *delict,* and that a contract has for its main, if not its only, purpose the bringing about the acquisition of rights of ownership. The falsity and mischievousness of this notion has been exhibited in great detail, and with much assiduity by Mr. Austin.

[38] Amos, Jurisprudence, pp. 164–166.

Turning now to Austin himself, we find this comment upon a passage from the famous jurist Heineccius:

> If you examine this passage closely, and take its parts in conjunction, you will find it involving the following assumptions: 1. That every acquisition of *dominium* consists of two degrees: One of them being the proximate; the other the remote cause of the right. One of them, *modus acquirendi* (strictly so called); the other *titulus*, or *titulus ad acquirendum*. 2. That the *titulus*, or remote cause of the right, always consists of an incident importing *jus in personam*, e.g. a contract.

And as to the doctrine of the Roman lawyers, he said that it seemed to be this:

> This *tradition* is not sufficient to pass an irrevocable right, unless the preceding contract bind the alienor, and therefore impart to the alienee *jus ad rem*. In other words, the *tradition* is not sufficient to pass the right irrevocably, unless the preceding contract amount to *justus titulus: titulus ad transferendum dominium habilis*. Accordingly every acquisition by delivery, made in pursuance of a contract, is divisible into two degrees: a mode of acquisition and a title to acquire.[39]

If, then, an obligatory contract was a necessary part of every conveyance, it would seem to follow that the transfer of the rights was to a certain extent due to this personal obligation, so that every conveyance would involve a continuing obligation of a kind. And the French code, therefore, said of a sale, where no tradition was necessary, but where title passed immediately, that the *dominium* was transferred *by virtue of the obligation of the contract*.[40]

As to the English law, it is, of course, extremely difficult to say what was the general view of the common law upon a question such as this. Professor Ames and Professor

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[39] Austin, Jurisprudence, pp. 995, 996, 999. Heineccius' work was published in 1789.

[40] Austin's comment on the language of the code is interesting. He says: "to style the sale a contract, is a gross solecism. It is however a solecism which may be imputed to the Roman lawyers; and with which it were not candid to reproach the authors of the Code. But when they talk of obligations as imparting dominium or property, they talk with absurdity which has no example, and which no example could extenuate. If they had understood the system which they so servilely adored and copied, they would have known that obligation excluded the idea of dominium: that it imparts to the obligee *jus in personam*, and *jus in personam* merely. This is its essential difference: This is the very property which gives it its being and its name." Jurisprudence, p. 1005.

Maitland have shown that the early law could not conceive of the transfer of rights as such. Their only conception was of the transfer of tangible things. A conveyance, therefore, according to Professor Ames, consisted of a transfer of the seizin or possession of the thing granted and an abandonment or extinguishment of the grantor's right in the thing. Thus Professor Ames says:

> A derivative title is commonly acquired from an owner by purchase or descent. The title in such cases is said to pass by transfer. For all practical purposes this is a just expression. But if the transaction be closely scrutinized, the physical *res* is the only thing transferred. The seller's right of possession, being a relation between himself and the *res*, is purely personal to him, and cannot, in the nature of things, be transferred to another. The purchaser may and does acquire a similar and coextensive right of possession, but not the *same* right that the seller had. What really takes place is this: the seller transfers the *res* and abandons or extinguishes his right of possession. The buyer's possession is thus unqualified by the existence of any right of possession in another, and he, like the occupant, and for the same reason, becomes absolute owner.[41]

And again he says:

> Even a relation between a person and a physical thing in his possession, as already stated, cannot be transferred. The thing itself may be transferred, and, by consent of the parties to such transfer, the relation between the transferror and the thing may be destroyed and replaced by a new but similar relation between the transferee and the *res*.[42]

This view of the transaction is further supported by referring to the old form of conveyance of the right of a disseized owner to his disseizor. The disseized owner's right constituted what was left of ownership after it had been bereft of seizin, and it gives some idea of the nature of an ordinary conveyance when it is pointed out that this conveyance, or release, as it was called at common law, was in its early form a "quit-claim" deed.[43] And the phrase "quit-claim" long retained its place in the conveyancing practice.

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[41] Select Essays in Anglo-American Legal History, vol. iii, p. 564.

[42] Ibid., pp. 482–483; and see the statements of Maitland in his essay on the Mystery of Seisin, pp. 601–602.

[43] Speaking of the forms of early releases, Holdsworth says: "Sometimes the party swore to abide by the transaction." History of English Law, vol. iii, p. 197.

It is interesting to place along side of these theories of early law the statement of Blackstone as to the nature of gifts of chattels personal, as showing the persistence of ideas in the field of law. He says: "Grants or gifts of chattels personal are the act of transferring the right and the possession of them; whereby one man renounces, and another immediately acquires, all title and interest therein."[44]

Now the theory stated by Professor Ames as the one on which the early law acted, that a gift was a transfer of possession together with a renunciation of right, when viewed philosophically would tend to lead to the conclusion that a conveyance involved a contract with a subsisting obligation. But it does not necessarily follow that the early law took this further step and more philosophical view. It would be mere theorizing to try to proceed any further than Professor Ames has himself gone. It may be noted that the quit claim deed generally contained words of grant as well, and that soon the phrases in common use were that the grantor would quit-claim "his right" or even "the land" to the grantee.[45] And according to Blackstone, repeating Littleton and Coke, a release from a disseized owner operated by way of passing the right (*mitter le droit*).[46] It is not certain, therefore, that the common law did regard a conveyance in the light of a contract with a subsisting obligation. Nor do we think that the rule that a person is always estopped by his own grant affords much evidence that there was an obligation and a contract involved in a conveyance, for this doctrine was only used when a person had made a deed of property which he could not then convey, but which he had afterwards become the owner of. The deed therefor could have had no operation as a conveyance, but was given effect as an estoppel.[47]

We do not find, however, writers of weight classifying

[44] 2 Blackstone's Coms., p. 421.
[45] 2 Pollock & Maitland, History of English Law, p. 91.
[46] 2 Blackstone's Coms., p. 325.
[47] 2 Blackstone's Coms., ed. Wendell, p. 290, note.

conveyances under contracts. Thus there is the statement of Blackstone, that contracts are executory or executed and that a contract executed differs nothing from a grant;[48] and a statement by his successor in the Vinerian Professorship to the effect that: "Particular goods and chattels may change their owner by gift or grant and by contract. These I mention together because, as Sir William Blackstone observes, even a gratuitous gift is not perfected but by delivery, and consequently, as I understand it, by the acceptance of the person to whom the goods are given, which has the semblance of a contract."[49] And we would point out that, call a conveyance a contract, and you raise the suggestion that there must be an obligation; you emphasize the fact that the grantee has his rights merely by the consent of the grantor; you obscure the part which the state takes in the matter; you suggest the idea that if one man obtains his right solely from another, he necessarily holds it subject to the will of the latter, who can go no farther than to bind himself never to exercise the power of revocation.

Finally there was the plain statement of Powell on Contracts, a work published in 1790, and written by a person evidently familiar with the civil law, that a conveyance involved a contract with an obligation. It was this work that Justice Washington relied upon, in his opinion in the Dartmouth College case.[50]

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[48] 2 Blackstone's Coms., p. 440 ff.

[49] 2 Wooddeson, Lectures, p. 410.

[50] After giving a definition of contract as found in Blackstone, and one from the civil law, Powell says, pp. 4–5: "Perhaps the following description will be deemed more simple than either. 'A contract is a transaction in which each party comes under an obligation to the other, and each, reciprocally, acquires a right to what is promised by the other.' It is evident that, under these definitions of a contract, every feoffment, gift, grant, lease, loan, pledge, bargain, covenant, agreement, promise, etc., may be included; for in all these transactions, there is a mutual consent of the minds of the parties concerned in them, upon agreement between them, respecting some property or right that is the object of stipulation. The ingredients requisite to form a contract are: First, Parties; Secondly, Consent; Thirdly, an Obligation to be constituted or dissolved. That these things must coincide is evident from the very nature and essence of a contract; for the regular effect of all contracts being

The English writers leaned strongly in the same direction. And, in spite of the opinion of Austin that it is an absurdity to say that the Roman law regarded an obligation as imparting *dominium,* it seems to us that when it was said that *tradition* alone was not sufficient to pass an irrevocable right if there was not a preceding contract binding the alienor, the obligation of such precedent contract is an essential part of the conveyance, and may be said to be subsistent in every conveyance, even though it is not, of itself, sufficient to effect the transfer of rights *in rem.*[51]

And, finally, we would point out that a distinction might be drawn between a conveyance by an individual and a conveyance or grant by the state, and that the latter might be regarded as more in the nature of a contract than the former, inasmuch as the state has the power to disregard its own grants.

As to the English law on this point, it is difficult to say what was the theory about Crown grants. It is true that Buller, J. said, in The King v. Passmore,[52] that "the grant of incorporation is a compact between the crown and a number of persons, the latter of whom undertake, in consideration of the privilege bestowed, to exert themselves for the good government of the place. If they fail to perform it, there is an end of the compact." The question in the case

on one side to acquire, and on the other to part with, or alien some property, or to abridge and restrain natural liberty by binding the parties, or one of them to do, or restraining them or one of them, from doing something which before he might have done or omitted doing at his pleasure, it is necessary that the party to be bound, shall have given his free assent to what is imposed upon him."

[51] As to the true theory of the matter, we are not able to refute the arguments of the modern jurists we have referred to. Their contentions seem unanswerable. And if their view is the correct one, it would seem much better not to speak of conveyances as contracts in any sense. The term contract distinctly suggests the idea of obligation. Possibly the writers who use it do see some sort of obligation in a conveyance. We have already noted the reference by Holland to Putchta's opinion "that in all derivative acquisitions there is a legal relation between the *auctor* and the person acquiring; not merely a loss by one and a gain to another, as in *usucapio.*" Holland, p. 153. What else can such a relationship be but a right *in personam* with its corresponding duty?

[52] 3 T. R. 246.

was, however, over the duties of the incorporators who clearly had entered into an obligatory contract. Speaking of franchises, Blackstone said: "But the same identical franchise that has been granted to one cannot be bestowed on another, for that would prejudice the former grant." Nevertheless, the authorities which he cites do not offer any special suggestion of the contract as opposed to the conveyance theory.[53] And also, as to the doctrine that the king cannot repeal a charter once granted, the leading case of The King v. Amery does not disclose any particular theory of contract.[54]

Whether it was because, being a believer in the general doctrines of natural rights and natural law, he considered that all conveyances were in the nature of contracts, or whether it was a distinction based upon the nature of state grants, we find that James Wilson, the reputed author of the "contracts clause,"[55] in an argument made in 1785, contended that whenever the state passes a law granting land,

[53] The two authorities are as follows: Keilway, 196 (1688): "To which the court responded and said, that if the King, by his letters patent dated May 1st grant me an office, or other things; and then by other patents dated May 2nd he grants the same thing to a stranger, these second patents are merely void, and moreover, I will have a *scire facias* against the second patentee and will avoid these last patent by judgment of the court." 2 Rolle, Abr. 191 (1668): "If the King grant two several letters patent of the same thing, the first patentee can have a *scire facias* against the later patentee to repeal the later patent."

[54] 3 T. R. 515; at 568, the court say: "The third and last question will then be, what is the effect of the subsequent charter of restoration by King James the Second? And as to that we are of opinion that it was a void charter, and of no effect. For though it be competent to the Crown to pardon a forfeiture and to grant restitution, that can only be done where things remain *in statu quo*, but not so as to affect legal rights properly vested in third persons, which is the case here; for Charles the Second whilst the forfeiture existed had incorporated a new body of men in the town, and invested them with new rights; which being done, it would not have been in the power of Charles the Second, and of course it was not within the power of his successors, to defeat an interest once legally vested in such new corporation; and there cannot exist in the same place two independent corporations with general powers of government, and therefore we think that such charter of restoration was absolutely void and of no effect."

[55] See the argument of Hunter in Sturges v. Crowninshield, 4 Wheat. 122.

or granting charters of incorporation or other privileges of that nature, such laws are to be considered as compacts. This argument was made in opposition to certain legislation then pending in the Legislature of Pennsylvania, the purpose of which was to repeal the charter of the Bank of North America, which had been granted by a preceding legislature. Among his reasons for opposing the legislation was the following:

> Because such a proceeding would wound that confidence in the engagements of government, which it is so much the interest and duty of every state to encourage and reward. The act in question formed a charter of compact between the legislature of this state, and the president, directors and company of the Bank of North America. The latter asked for nothing but what was proper and reasonable: the former granted nothing but what was proper and reasonable; the terms of the compact were, therefore, fair and honest; while these terms are observed on one side, the compact cannot, consistently with the rules of good faith, be departed from on the other.[56]

Again, after stating that in most cases it is true that a state must have the power to amend and repeal its own laws, he continues:

> Very different is the case with regard to a law by which the state grants privileges to a congregation or other society. Here two parties are instituted, and two distinct interests subsist. Rules of justice, of faith, and of honor, must, therefore, be established between them: for if interest alone is to be viewed, the congregation or society must always lie at the mercy of the community.
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> Still more different is the case with regard to a law by which an estate is vested or confirmed in an individual; if, in this case, the legislature may, at discretion, and without any reason assigned, divest and destroy his estate, then a person, seized of an estate in fee simple, under legislative sanction, is, in truth, nothing more than a solemn tenant at will.
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> For these reasons, whenever the objects and makers of an instrument, passed under the form of a law, are not the same, it is to be considered as a compact and interpreted according to the rules and maxims by which compacts are governed.[57]

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[56] 1 Wilson's Works, ed. Andrews, p. 565.

[57] Wilson held a doctrine of obligation which may be epitomized in the following sentences taken from the law lectures which he published in 1792. After stating Pufendorf's doctrine "that obligations are laid on human beings by a superior," he continues: "To different minds the same things, sometimes, appear in a very different manner. If I was to make a maxim upon this subject, it would be precisely the reverse of the maxim of Baron Pufendorf. Instead

If it erred at all, we think the summary heretofore made of the authority which Marshall had for his ruling that a grant was essentially a contract, erred because it stated the case too weakly.

In discussing the question whether a conveyance is a contract, it was not clearly determined whether the "obligation" of a contract, as that term is used in the Constitution, referred to the obligation created by positive law, or to some other obligation—say that created by natural law. Nor was it necessary to do so in order to pass judgment upon the point. For if the obligation was that created by positive law, the Roman, civil and common law authorities which we have cited were clearly in point, and the doctrines of natural law would still have had a bearing on the question, not as being absolute authorities, but as having some persuasive force. If, on the other hand, the term "obligation," as we suggested, was intended to have reference to what may be called the "natural law" obligation of con-

of saying that a man cannot obligate himself; I would say, that no other person on earth can oblige him, but that he certainly can oblige himself. Consent is the sole principle, on which any claim in consequence of human authority, can be made upon one man by another . . . exclusively of the duties required by the law of nature, I can conceive of no claim, that one man can make on another but in consequence of his own consent." Wilson's Works, ed. Andrews, p. 190. As we have been quoting freely from Pufendorf to show the contractual nature of a conveyance, upon the principles of natural law, and as the doctrines attributed to him by Wilson, in the above quotation, suggest a theory of analytical rather than natural jurisprudence, we would make the following explanation of the apparent discrepancy. Pufendorf did state the doctrine thus attributed to him. At the same time he regarded consent as constitutive of obligations: The law of nature is sanctioned by the command of God. Book 2, chap. viii, sec. 20. By the law of nature certain obligations are born with men, others, which he calls "adventitious," "fall upon men by the intervention of some human deed, not without the consent of the parties. . . . When men have engaged themselves by pacts their nature obliges them as sociable creatures, most religiously to observe and perform them." Book 3, chap. iv, sec. 3. The state is founded upon the social and governmental compacts. Book 7, chap. ii, secs. 6, 7, 8. Civil law does not abrogate natural law. Indeed he says that, when mankind entered into the social compact, "we must suppose that they took it for granted that nothing should be established by the civil law which was contrary to the natural."

tracts, then the writers upon natural law could be considered as furnishing the best authority to be had.

It becomes necessary now, however, to determine more carefully by what law the obligation spoken of in the Constitution is to be determined. By the term "obligation" as used in the "contracts clause," did the framers refer to the obligation as fixed by positive law, that is, by the law of the States, or to the moral obligation, or to the obligation as fixed by the law of nature, then generally assumed to exist, or to the obligation as determined by the established principles of the common law, or to the obligation as determined by the federal courts in the application by them of what might be called a federal common law?

The chief difficulty which arises with reference to the positive law theory of obligation is to determine how a state can obligate itself by a contract when its own law is conceived of as the sole creator and definer of obligation. It will, therefore, be necessary to consider with some care this point.

CHAPTER III

Can a State be Obligated by a Contract?

In considering this, the second question raised in Fletcher v. Peck, we are confronted by the question, as already suggested, by what law is a state obligated by its contract? Austin laid it down that a sovereign state could not possess legal rights, must less owe legal duties.[1] Might there not be some other law for determining the obligation of a contract to which the framers of the Constitution had reference? Particularly as to the contracts of the States, is there not some superior law which binds the States to their obligations? The answer is at once suggested that the Constitution of the United States is the superior law which creates the obligation. This idea is clearly expressed by Taylor, one of the earlier writers in this country, upon the law of private corporations. He says: "Further, to say that the state, from which emanate most of the rules of law composing the constitution [of a corporation] is a party to the agreement which the constitution embodies, means that the state has done an act whereby it has expressed its intention to bring itself within the operation of some law superior to itself, which thereupon manifests itself in legal relations between the state and the corporation, legal relations which the state cannot alter at its will, since they are the manifestations of a law superior to itself. That paramount law is expressed in the constitution of the United States."[2] We do not think, however, that this is the correct view of the matter, and for proof thereof would refer to the leading case of Ogden v. Saunders.[3]

[1] Lectures on Jurisprudence, 3d ed., pp. 288–292.
[2] Taylor on Private Corporations, sec. 448.
[3] 12 Wheat. 213.

The question which arose for determination in that case was whether a state insolvency law should be declared invalid as impairing the obligation of contracts in so far as it attempted to discharge debtors from liability upon their contracts, in the case where such contracts were made subsequently to the passage of the law. Several views were taken of this question, which we shall endeavor to state in a very brief way. The majority of the court held that the obligation of a contract is determined by positive law, and hence that no obligation can arise out of any contract which will conflict with that law as it exists at the time the contract is entered into.

The counsel for the defendant contended that the Constitution was the supreme law of the land and that, since it entered into the obligation of a contract as much as the state insolvency law itself did, and since it forbade the impairment of the obligation of contracts, it clearly nullified the operation of the state insolvency law. To this obviously unsound argument Justice Trimble gave the following admirable answer:[4]

> The law of the state, although it constitutes the obligation of the contract, is no part of the contract itself; nor is the constitution either a part of the contract, or the supreme law of the state in the sense in which the argument supposes. The constitution is the supreme law of the land upon all subjects upon which it speaks. It is the sovereign will of the whole people. Whatever this sovereign will enjoins, or forbids, must necessarily be supreme, and must counteract the subordinate legislative will of the United States and of the States. But on subjects, in relation to which the sovereign will is not declared, or fairly and necessarily implied, the constitution cannot, with any semblance of truth, be said to be the supreme law. It could not, with any semblance of truth, be said that the constitution of the United States is the supreme law of any state in relation to the solemnities requisite for conveying real estate, or the responsibilities or obligations consequent upon the use of certain words in such conveyances. The constitution contains *no law*, no declaration of the sovereign will, upon these subjects, and cannot, in the nature of things, in relation to them, be the supreme law. Even if it were true, then, that the law of a state in which a contract is made, is part of the contract, it would not be true that the constitution would be part of the contract. The constitution nowhere professes to give the law of contracts, or to declare what shall or shall not be the obligation of contracts. It evidently pre-

[4] 12 Wheat. 213 at 325–326.

supposes the existence of contracts by the act of the parties, and the existence of their obligation, not by authority of the constitution, but by authority of law; and the preëxistence of both the contracts and their obligation being thus supposed, the sovereign will is announced that no state shall pass any law impairing the obligation of contracts. If it be once ascertained that a contract existed, and that an obligation, general or qualified, of whatsoever kind had once attached or belonged to the contract by law, then, and not till then does the supreme law speak, by declaring *that* obligation shall not be impaired.

This argument seems to us conclusive that the effect of the "contracts clause" is not to make the "obligation of contracts" a creation of federal law. And although the case at hand involved only a private contract, the argument applies with equal force to State contracts, because it is based upon a construction of the very words of the "contracts clause" itself.

Nor did Chief Justice Marshall, who delivered the dissenting opinion, speaking for himself and on behalf of Justices Story and Duval, use any such argument as the one we have just been considering. His argument is founded on the theory that the obligation of a contract does not rest upon positive law, but upon natural law, and is therefore intrinsic in the contract itself, rather than imposed from without. The theory of natural law is elegantly set forth. And the argument is a strong one, not because of the intrinsic soundness of the natural law theory, but from the consideration which Marshall stated in the following manner:

When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose, that the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration, that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our constitution, took the same view of the subject, and the language they have used confirms this opinion.

Finally, the Chief Justice pointed out that if the view of the majority was correct, the States might pass acts declar-

ing that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, which would thereupon be a condition upon which every contract would thereafter be made; "thus, one of the most important features in the constitution of the United States, one which the state of the times most urgently required, one on which the good and wise reposed confidently for securing the prosperity and harmony of our citizens, would be prostrate, and be construed into an inanimate, inoperative unmeaning clause." He also made this pertinent suggestion: "Had the intention been to confine the restriction to laws which were retrospective in their operation, language could have been found and would have been used to convey this idea."

The argument thus made is, in itself, a telling one. The "Fathers" were versed in the law of nature and of nations and did hold to its principles. Remembering that fact, and viewing the language of the "contracts clause" literally, one is disposed to come to the same conclusion that the Chief Justice did.[5] "This argument," said Justice Trimble, referring to that of the Chief Justice, "struck me, at first, with great force." Three of the four majority justices, indeed, distinctly recognized that there was a natural law which sanctioned the obligation of contracts.

The difficulty with Marshall's argument was that it could not be applied to the existing state of things. The *reductio ad absurdum* which follows from endeavoring to apply it is the best kind of proof, not that the "Fathers" did not believe in natural law, nor that they did not intend to refer to the "natural" obligation of contracts, but that the natural law theory is fallacious and will not work. Thus, it was asked, how, if the "natural" obligation of all contracts was guaranteed by the Constitution, could a State pass stat-

[5] We shall, hereafter, review the evidence which can be adduced to show what the intention of the framers was in regard to the "contracts clause," and also to show how much of this evidence Marshall could have had to guide him in reaching the decisions we are reviewing.

utes of limitations, statutes of frauds, statutes forbidding usury contracts, gambling contracts, contracts by persons under twenty-one years of age? Marshall answered that statutes of frauds, registration acts, etc., did not impair the obligation, rather they simply prescribed forms and rules of evidence, and that statutes of limitations act upon the remedy, not upon the obligation. Both of these points seem well taken, but when he argues in favor of the validity of usury laws: "They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation and cannot impair that which never came into existence," when he allows to the state the right "to regulate contracts, to prescribe the rules by which they shall be evidenced, *to prohibit such as may be deemed mischievous,*"[6] it seems that the majority had good reason for saying that he thereby surrendered his whole argument. If a State can forbid any contract it deems mischievous, it takes a good deal of searching to discover the remains of any obligation, in the natural law sense, still protected by the federal Constitution. If it can forbid entirely the making of contracts, it can surely attach to them the condition that they shall be subject to be discharged upon the insolvency of the debtor being established after proceedings taken.

The position of the majority clearly is, therefore, that the civil obligation of contracts, at least when it is clearly and positively declared, is the paramount obligation, and is the one that the Constitution protects.

But they do not deny the existence of a natural obligation and its operation in certain cases. It may be that the "obligation" of a "contract" between a State of the Union and one of its citizens is founded on natural rather than municipal law. At any rate, it is desirable to understand more clearly the views of the majority in so far as they bear upon this question. Justice Washington, speaking of the universal law of civilized nations, says:

[6] Italics ours.

I, therefore, feel no objection to answer the question asked by the same counsel—what law is it which constitutes the obligation of the compact between Virginia and Kentucky? by admitting, that it is the common law of nations which requires them to perform it. I admit further, that it is this law which creates the obligation of a contract made upon a desert spot, where no municipal law exists and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce. . . . Whilst I admit, then, that this common law of all nations, which has been mentioned, may form in part the obligation of a contract, I must unhesitatingly insist, that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made or is to be executed.[7]

Justice Johnson's ideas are found expressed in the following quotation:

Right and obligation are considered by all ethical writers as correlative terms. . . . The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three,—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society and an advanced state of society . . . in which I will undertake to say that all the contracts of men receive a relative, and not a positive interpretation: for the rights of all must be enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted.[8]

Justice Thompson did not discuss the question whether, in regard to State contracts, there was an obligation arising from natural law. He was contented with viewing the obligation as the creature of municipal law, and confined himself to the contract at hand. Justice Trimble's conception was as follows:

I admit, that men have, by the laws of nature, the right of acquiring, and possessing property, and the right of contracting engagements. I admit that these natural rights have their correspondent natural obligations. I admit, that, in a state of nature, when men have not submitted themselves to the controlling authority of civil government, the natural obligation of contracts is co-extensive with the duty of performance. This natural obligation is founded solely in the principles of natural or universal law. . . . This natural obligation exists among sovereign and independent states and nations, and amongst men, in a state of nature, who have no common supe-

[7] 12 Wheat. 213 at 258–259.
[8] 12 Wheat. 213 at 281–282.

rior, and over whom none claim, or can exercise, controlling legislative authority. But when men form a social compact, and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government. I think it incontestably true that the *natural* obligation of *private* contracts between individuals in society, ceases, and is converted into a *civil* obligation, by the very act of surrendering the right and power of enforcing performance into the hands of the government.

As, in a state of nature, the natural obligation of a contract consists in the right and potential capacity of the individual to take or enforce the delivery of the thing due to him by the contract, or its equivalent; so, in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to the contract, and enforces its performance, or gives an equivalent in lieu of performance. From these principles it seems to result as a necessary corollary, that the obligation of a contract made within a sovereign state, must be precisely that allowed by the law of the State and none other. I say, *allowed,* because if there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for, and put in the place of, natural obligation, would be coextensive with it; but if by positive enactions, the civil obligation is regulated and modified so as that it does not correspond with the natural obligation, it is plain, the extent of the obligation must depend wholly upon the municipal law.[9]

Story, in his Commentaries, expresses his understanding of the obligatory nature of state contracts in the following manner:

Nor is this obligatory force so much the result of the positive declaration of the municipal as of the general principles of natural or (as it is sometimes called) universal law. . . . Nay there may exist (abstractly speaking) a perfect obligation in contracts where there is no known and adequate means to enforce them. As, for instance, between independent governments. . . . So in the same government, where a contract is made by a State with one of its own citizens, which yet its laws do not permit to be enforced by any action or suit. In this predicament are the United States who are not suable on any contracts made by themselves; but no one doubts that these are still obligatory on the United States. Yet their obligation is not recognized by any positive municipal law, in a great variety of cases. It depends altogether upon principles of public or universal law. . . . The civil obligation of a contract, then, though it can never exist contrary to positive law, may arise or exist independently of it, and it may exist notwithstanding there may be no present adequate remedy to enforce it.[10]

These quotations show how strong was the influence of the natural law theory during the period when the meaning of the "contracts clause" was being outlined. It will be

[9] 12 Wheat. 213 at 319–320.
[10] Story on the Constitution, sec. 1381, p. 251.

well to remember, in reading Fletcher v. Peck, and Dartmouth College v. Woodward, that Marshall felt that the obligation of a contract was not dependent on any narrow and technical considerations, but on the broad basis of natural right and justice. And even when the rest of the court disagreed with him and, being forced by the circumstances of the case to choose between positive and natural law, he stood out for the supremacy of positive law, they did not deny the existence of a law of nature. It is difficult to state exactly what position the majority of the court took in Ogden v. Saunders in regard to the obligation of contracts made between a State and one of its citizens. The question was not immediately before them. All the justices admitted the existence and validity of natural law. As to private contracts, civil law supersedes natural law, but it impliedly adopts the principles of natural law unless it expressly enacts otherwise. It is fair to assume that they either regarded a state as bound by its contracts with its citizens by the sanction of natural law alone, or that the municipal law has impliedly adopted the principles of natural law in this matter.

Defenders of natural law obviously would not find the trouble that the Austinians have found in holding that a sovereign state may be obligated by its contract. For this the authority of James Wilson, the reputed author of the "contracts clause," may be cited. Thus he says, speaking of the state:

> It is an artificial person. It has its affairs and its interests; it has its rules; it has its obligations; and it has its rights. It may acquire property, distinct from that of its members; it may incur debts, to be discharged out of the public stock, not out of the private fortunes of individuals: it may be bound by contracts and for damages arising *quasi ex contractu*.[11]

So also Pufendorf says: "That no Prince hath power to release himself from his oath, when there lies no objection either against the validity of his taking it, or the matter contained in it, or the circumstances belonging to it, upon pre-

[11] Wilson's Works, ed. Andrews, p. 272.

tence that it is lawful for him to relieve his subjects in some particular oaths, I think is evident. For the oaths which he has power to vacate in his subjects have always this condition annexed to them *if it please the sovereign*. And 'tis certain it would be impossible to bind any obligation upon a man if he reserves to himself a power to break from it whenever he thinks fit." Further he says: "and therefore upon the whole all contracts made by the prince oblige the commonwealth, unless they are manifestly absurd or unjust. And when the case is doubtful 'tis always to be presumed in favor of the prince. . . . And so whatever a free people contract, devolves upon and obliges the person they afterwards confer sovereignty upon, though they give him never so full and absolute a power."[12]

We have seen, therefore, that it was the natural law theory of the obligation of a contract that was looked to as furnishing the test of the obligation of state contracts, and that, upon this theory, an obligation exists entirely irrespective of the legal omnipotence—the sovereignty—of one of the contracting parties. The English Parliament could be as completely obligated by its contract as any of our state legislatures by theirs. It is therefore clear that the criticism so often made of the Dartmouth College case, that the English Parliament could not have been obligated by any contract in connection with the grant of the college charter, is entirely beside the point. The argument is a valid one, when it is used to show that no contract could have been intended, under the well understood principles of law existing when the charter was granted; but if it is attempted to go farther, and to say that there could not possibly have been any contract, because of the legal omnipotence of Parliament, we think the argument overlooks the meaning which the court has attributed to the word "obligation." And we would further point out that, except in so far as the legislatures of the states are restrained by constitutional provisions of their own, they are as legally omnipotent as Parlia-

[12] Law of Nature and Nations, Book 8, chap. x, sec. 3, pp. 865–866.

ment, and if Parliament cannot obligate itself, they are equally as incapable of binding themselves by contract.

If the federal courts do, as a matter of practice, construe state contracts by applying principles of natural right and justice, it becomes a matter of no practical importance whether we allow these principles an independent authority or regard them as impliedly adopted by the municipal law of the States. The only difference which one would imagine might result would be an increased respect for the decisions of the state courts, if the question to be decided is avowedly one of state law. The attitude of the federal courts towards state decisions, in this class of cases, is indeed one of great independence, but this does not necessarily lead to the conclusion that the federal courts do not rest the obligation of contracts upon state law. In the first place this independence of judgment is asserted even where the determination of the obligation of a contract necessitates a construction of the state constitution or statutes.[13] In the second place, in cases where the federal jurisdiction is based upon diversity of citizenship, and where it is generally admitted, therefore, that the federal courts are applying state law, these courts may exercise an independent judgment as to what the state law is; and in matters of commercial law and general jurisprudence they consider themselves peculiarly free from any obligation to follow state decisions.[14]

An interesting case that comes rather close to settling the theoretical question we are discussing and which yet does not quite do so, is Douglas v. Kentucky,[15] where the court refused to apply the rule it had previously established that "if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action

[13] Jefferson Branch Bank v. Skelly, 1 Black, 426.
[14] Burgess v. Seligman, 107 U. S. 20; Swift v. Tyson, 16 Pet. 1.
[15] 168 U. S. 488.

of legislation, or decision of its courts altering the construction of the law.[16]

Here the facts were that the legislature had granted a lottery privilege to a municipality, which had sold it to a private individual. Before the latter resold it, there had been a decision of the highest court of the State holding that a grantee or his assigns who invested money on the faith of a lottery grant, acquired a legal right thereto, and, in addition, a *quo warranto* had been issued against the purchaser of the lottery in dispute and had been decided in favor of the owner. On the strength of these decisions the plaintiff purchased the lottery. Later a repealing act was passed. The Court of Appeals of Kentucky reversed itself and allowed the repealing act to stand, and an appeal was taken to the United States Supreme Court. Thus, the case contained facts which brought it completely within the rule laid down by Taney in Life Insurance Co. v. Debolt, and adopted by the whole court in Gelpcke v. Dubuque. There was the prior state decision holding that a lottery franchise was a valid contract; there was a purchase made on the faith of that decision, whereby the purchaser and the state, on the doctrine of novation, entered into a new contract; there was a subsequent reversal of the former decision by the state court, and an application by the state court of a statute repealing the grant. Had the question been considered to be only whether or not, at the time the plaintiff purchased the lottery, the state law regarded him as obtaining a legal title thereto good as against the State, as acquiring a legal right that the lottery grant should not be repealed, it should have been answered in the affirmative, certainly if the rule of Gelpcke v. Dubuque was to be applied. But the court refused to apply the rule of Gelpcke v. Dubuque. The court said: "The defendant insists that his rights having been acquired when these decisions of the highest court of Kentucky were in full force, should be protected according

[16] Life Insurance & T. Co. v. Debolt, 16 How. 416; Gelpcke v. Dubuque, 1 Wall. 175.

to the law of the state as it was adjudged to be when those rights attached. But is this court required to accept the principles announced by the state court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the state Legislature? Clearly not. . . . This court must determine—indeed it cannot consistently with its duty refuse to determine—upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract the obligation of which is protected by that instrument against hostile state legislation."

The rule of Gelpcke v. Dubuque and Life Insurance Co. v. Debolt is rather clearly based on the idea that the validity and obligation of the contract is determined by state law, and for this reason the decisions in force at the time of the formation of the contract are to be regarded as fixing its obligation. It is difficult to say, however, whether Justice Harlan refused to regard those decisions, on the ground that the federal court was not administering state law at all, or simply upon the ground that the rule of Gelpcke v. Dubuque was a rule of policy, which did not obviate the duty incumbent upon the court of exercising an independent judgment and, when the occasion required, of making an exception to the rule.

As to what contracts the States may make and what they may not make, the Supreme Court has made a number of somewhat varied rulings. From the nature of the case, it is difficult to draw a line between contracts which the States may make and those which they may not make. In the Ohio Bank Tax cases[17] in which the question of the validity of contracts as to exemption from taxation was reargued, the majority simply argued that the power of a state to contract was a result of its sovereignty, and that to deny it this power was to deny it its sovereignty. The court has, how-

[17] Piqua Branch Bank v. Knoop, 16 How. 369, and Ohio Life Insurance Co. v. Debolt, 16 How. 416.

ever, held that the States cannot contract away their power[18] of eminent domain, or their police power,[19] nor any of their power to supervise and regulate the forms of administering justice.[20] A State cannot contract concerning governmental subjects, hence it cannot contract with the citizens of a town that, upon fulfilling certain conditions, it will establish the county-seat at that place.[21] Land under navigable waters cannot be alienated except in parcels which can be disposed of without detriment to the public interest in the lands and waters remaining.[22] On the other hand, perpetual corporate, ferry, turnpike, gas, water, railroad and street railway franchises have been held to be contracts within the protection of the "contracts clause." These privileges may be made exclusive as well. Finally, the State may grant exemptions from rate regulation at the hands of the legislature.[23]

Obviously the court has not been particularly consistent in its rulings as to what may and what may not be the subject of contracts by the States. But upon principles of natural law or general jurisprudence there is abundance of room for differences of opinion as to the proper limits of the power of states to contract. That even the writers upon natural law placed some limits upon the right of the state to contract may be seen from a rather interesting passage from Pufendorf. He says:

> What hath been said of the contracts of princes may also be said of their grants and donations, viz: that they cannot be recalled by the successors where they were made upon fair and reasonable reasons. . . . What hath been said with relation to grants may also be applied to privileges and immunities, namely, that it ought to be considered upon what reasons and with what moderation and caution they were given, and whether they were consistent with the peace and security of the state, for without dispute, these things are of far greater concern than the unwary easiness of the prince. And

[18] Cincinnati v. Louisville & N. R. Co., 223 U. S. 390.
[19] Stone v. Mississippi, 101 U. S. 814.
[20] Bank of Columbia v. Okely, 4 Wheat. 235, 245; and Cairo, etc. R. Co. v. Hecht, 95 U. S. 168.
[21] Newton v. Commissioners, 100 U. S. 548.
[22] Illinois Central R. Co. v. Illinois, 146 U. S. 387.
[23] See the special chapters on franchises and rate exemptions.

indeed all privileges are to be confined under such limitations whenever they begin to lie heavy upon the other subjects.[24]

It is apparent that in determining, in a concrete case, whether or not a contract with the state exists, as, for example, in the case of the grant of corporate privileges, the theory and practice upon the subject of state contracts must be given some consideration, even if the ultimate sanction of the contract be natural or universal law. The reason is that natural law only renders obligatory that to which the parties intend to bind themselves, and in a state whose municipal law has never recognized any contractual relation between the state and its grantee in the granting of corporate franchises, it would be difficult to say that a contract was intended by the parties. Hence, in considering the Dartmouth College case, it will be necessary to examine the doctrines of the common law and the established parliamentary precedents in regard to corporate grants before it can fairly be determined whether an obligatory contract, even upon principles of natural law, was created by the grant.

Before beginning the discussion of that case, however, it is desirable to see what are the essentials of an obligatory state contract upon positive law principles alone, for modern jurists generally agree that it is proper to speak of a state being obligated by a contract merely under the sanction of its own municipal law.

Recognizing the fact which we have already stated, that obligation is the legal relationship between the parties, that it is, from one point of view, the legal duty owed by one person to another, and from another point of view, the legal right or power which that other has to control the actions of the first, and recognizing that this right and duty are the creatures of law, Austin laid it down that the state, which was the source of all law, could not be limited or bound by law, and therefore could owe no legal duties, could be sub-

[24] Pufendorf, p. 867.

ject to no legal obligations.[25] In fact, he held that it could possess no legal rights. This opinion is likewise held by Markby[26] and by Amos,[27] and it may be found in one, at any rate, of the decisions of the Supreme Court of the United States, for, in Kawanakoa v. Polybank,[28] Justice Holmes, in extending the doctrine of the non-suability of the state to protect the government of the territory of Hawaii, explained the theory as follows: "A sovereign is exempt from suit, not because of any formal conception or absolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

Recent writers have shown very clearly, however, that the subject may have rights as against the sovereign, because that which makes any other right a legal right is merely its recognition as such by the sovereign; if, therefore, the sovereign recognizes the existence of rights as against itself, these rights are legal rights. There is no higher sanction to any legal right than this.[29] So Brown says, in his work, The Austinian Theory of Law: "Sovereignty does not preclude the notion of obligation, but only the notion of limitation by a power external to itself." Pollock says: "In practice, individual citizens may count on the submission of the State to its own tribunals (whatever the extent of it may be) not being arbitrarily revoked. The security is the same, in the last resort, that we have for the due administration and enforcement of the ordinary law binding on subjects." Salmond is so excellent upon this point that we shall quote his argument in full. He says:

A subject may claim rights against the state, no less than against another subject. He can institute proceedings against the state for the determination and recognition of these rights in due course of

[25] Austin, Jurisprudence, 3d ed., pp. 288–292.
[26] Markby, sec. 154, p. 92.
[27] Amos, Science of Jurisprudence, p. 77.
[28] 205 U. S. 349.
[29] See Pollock, First Book of Jurisprudence, p. 63 ff.; Brown, The Austinian Theory of Law, p. 194; Salmond, p. 202 ff.; Holland, p. 126.

law, and he can obtain judgment in his favor, recognizing their existence or awarding to him compensation for their infringement. But there can be no enforcement of that judgment. What duties the state recognizes as owing by it to its subjects, it fulfills of its own free will and unconstrained good pleasure. The strength of the law is none other than the strength of the state, and cannot be turned or used against the state whose strength it is. The rights of the subject against the state are therefore imperfect. They obtain legal recognition but no legal enforcement.

The fact that the element of enforcement is thus absent in the case of rights against the state has induced many writers to deny that these are legal rights at all. But as we have already seen, we need not so narrowly define the term legal right, as to include only those claims that are legally enforced. It is equally logical and more convenient to include within the term all those claims that are legally recognized in the administration of justice. All rights against the state are not legal, any more than all rights against private persons are legal. But some of them are; those, namely, which can be sued for in courts of justice, and the existence and limits of which will be judicially determined in accordance with fixed principles of law, redress or compensation being awarded for any violation of them. To hold the contrary and to deny the name of legal right or duty in all cases in which the state is the defendant is to enter upon a grave conflict with legal and popular speech and thought. In the language of lawyers, as in that of laymen, a contract with the state is as much a source of legal rights and obligations as is a contract between two private persons; and the right of the holder of consols is as much a legal right, as is that of a debenture holder in a public company. It is not to the point to say that rights against the state are held at the state's good pleasure, and are therefore not legal rights at all; for all other legal rights are in the same position. They are legal rights not because the state is bound to recognize them, but because it does so.

Whether rights against the state can properly be termed legal depends simply on whether judicial proceedings in which the state is the defendant are properly included within the administration of justice. For if they are rightly so included, the principles by which they are governed are true principles of law, and the rights defined by these legal principles are true legal rights. The boundary line of the administration of justice has been traced in a previous chapter. We there saw sufficient reason for including not only the direct enforcement of justice but all other judicial functions exercised by courts of justice. This is the ordinary use of the term and it seems open to no logical objection.

And a further quotation from Brown will, perhaps, aid in understanding the matter:

If a sovereign, having laid down a law that contracts shall be enforced, enters into contracts with its own subjects, and if those contracts are enforced as a matter of fact by its courts even as against the sovereign, then it is impossible to deny that the sovereign is under a legal duty towards its subjects. We cannot refuse to describe the sovereign's liability as a legal duty on the ground that the sanction is self imposed, if as a matter of fact the sanction is

invariably admitted by the sovereign, and applied by the courts. Austin's failure to recognize the fact is a conclusive illustration of the need for revising his theory of sovereignty.[30]

So, also, Holland says:

Indeed it is not improper to talk of the state as having duties, namely such as it prescribes to itself, though it has the physical power to disregard and the constitutional power to repudiate them. Such duties as we often see enforced, e.g. in England, principally, but not exclusively by a Petition of Right, which is lodged with the Home Secretary, and, after due investigation, receives, in suitable cases, the Royal *fiat* "let right be done." The subsequent proceedings follow the course of an ordinary action. This remedy is inapplicable in cases of tort.[31]

Although this, the latest view of modern jurists, allows that the state may be under legal obligations, and goes far toward supporting the doctrine that a legally omnipotent legislature is obligated by its grant of lands or franchises, there is, nevertheless, a certain difficulty in applying the conception to the concrete case of a grant by the state.

Although these same jurists deny that a grant is, generally speaking, a contract, nevertheless, we have seen that, for the purposes of the "contracts clause" it is to be so regarded, and that the only way in which it can be so regarded is by implying an agreement not to revoke the grant. Now there is no legal procedure in any state, whose government is organized without constitutional limitations, by which any such contract can be recognized, let alone enforced. That is to say, Parliament, for example, has provided for a legal recognition as against itself, of the obligation which it creates when it agrees to pay a certain sum of money at a certain time. It has not provided for any direct legal recognition of the specific contract not to repeal a franchise granted or a land grant made. The point, of course, is a rather finely drawn one. We think it correct to say, however, that, in the eye of the law, to-day as well as in Blackstone's time, the legal title which an individual has to a piece of land conveyed to him by the state is as

[30] Brown, The Austinian Theory of Law, p. 194.
[31] Holland, Jurisprudence, 10th ed., p. 126.

strong as that which he has to a similar piece of land conveyed to him by another individual. And we think it probably correct to say that, in Blackstone's time, a grant of franchises by the Crown or by Parliament was regarded as conveying legal rights—legal rights, the court would have said, had it been possible to bring the abstract question before them, even as against Parliament. In this case, we think it correct to say that state grants give rise, by municipal law, to legal rights against the state: (and, if the grant be regarded as a contractual relation, that the right of the individual and the corresponding duty of the state may properly be spoken of as a legal obligation).

The principal question, then, in the Dartmouth College case, must be whether or not corporate charters—at least the charters of colleges—were regarded, at the time of the grant in question, as a species of private property. This inquiry is of almost equal importance whether the existence of the obligation is to be determined by natural or municipal law. Finally, it may be noted that, in a state whose government is organized with a legally omnipotent Parliament, as is England, it may well be that the question of the inviolability of private property or of state grants can not be determined entirely by reference to the law as administered by the courts. Reference must also be made to the actual practice of the sovereign body which, perhaps as much as anything else, will show the nature of the rights of individuals.

CHAPTER IV

The Dartmouth College Case

We have reserved for consideration in this chapter the most famous of all the cases dealing with the "contracts clause"—Trustees of Dartmouth College v. Woodward.[1]

The broad constitutional question involved in that case was whether a charter of incorporation constituted a contract within the protection of the "contracts clause" of the United States Constitution. But this was by no means the only question that had to be decided. Those who have found fault with the most important principle there laid down have also tried to discredit the decision by pointing out errors of law in regard to other points involved, and errors in the statement of facts, each of which, they contend, are sufficient to have caused a reversal of the whole decision. The case, therefore, cannot be fairly discussed, nor really understood, without some consideration of these collateral questions.

Dartmouth College was incorporated by a charter from the Crown (signed in behalf of the king by Governor Wentworth of New Hampshire) granted in 1769. It cannot be gainsaid that, in the year 1816, and ever since its incorporation, practically, Dartmouth College had been a "going concern," with lands, buildings, trustees, faculty and students, all located in what was, after 1776, the State of New Hampshire. In the year 1816, the legislature of New Hampshire passed three laws amending the charter of the college so as to change its name to "The Trustees of Dartmouth University"; to change the number of trustees from twelve to twenty-one, of whom nine should constitute a quorum; to provide that the nine new trustees be appointed by the

[1] 4 Wheat. 518.

Governor and Council; to provide for a board of overseers of twenty-five members, appointed by the Governor and Council, with power to veto the acts of the trustees relative to the appointment of the president and faculty and to other administrative matters; to provide that each of the two boards should have power to remove any of their members; and to give the trustees power to organize colleges in the university. These remarkable amendments, it will easily be perceived, were drawn up to accomplish a particular purpose. There had been a schism in the old board of trustees. The rock upon which the board had split, by a vote of eight to four, was the president of the college, Dr. John Wheelock, son of the founder. The history of the events leading up to the passage of the amending acts is interesting. As recited by Shirley, in the work already referred to, it shows the spread of the controversy until, from a quarrel among the Trustees of Dartmouth College, it assumed the shape of a state-wide political controversy, the sides of which were taken by the Federalists and the Anti-Federalists respectively,[2] but all this is immaterial to a discussion of the case from a legal standpoint.[3] It will suffice to point out that the addition of the nine new trustees was evidently intended to turn the party of the minority into the party of the majority. The old trustees refused to accept the amendments and removed Woodward, the secretary and treasurer of the corporation, who joined the camp of the enemy, taking with him the seal and record books of Dartmouth College, and was made secretary and treasurer of the newly organized "Dartmouth University." The old trustees thereupon brought an action of trover in the name of the old corporation to recover their seal and records from Wood-

[2] According to Shirley in his work entitled "The Dartmouth College Causes," which is accepted by H. C. Lodge in his Life of Daniel Webster.

[3] It has been contended that the decision was chiefly due to the political aspect of the case, which Webster astutely played upon in his argument before the Supreme Court—Lodge, Life of Webster, p. 89—but this inference, of course, cannot with fairness be drawn before the legal questions have been examined.

ward, and this action it was that was brought before the Supreme Court. It was contended before that court that the acts of 1816 impaired the obligation of the contract contained in the charter.

It is important to set out the facts in slightly more detail, particularly the circumstances surrounding the grant of the charter, inasmuch as Mr. Shirley, in his book entitled "The Dartmouth College Causes," already referred to, has challenged the statement of facts which Chief Justice Marshall made in delivering his opinion as erroneous and intentionally misleading, and as giving an entirely different aspect to the case from that which it would otherwise have had.

The facts of the case were found by a special verdict of the jury (which really was agreed upon by stipulation between counsel), which is set out in full in Wheaton's report. It was upon these facts that the case came before the Supreme Court. The verdict began by setting forth the charter which, as usual, set out in the preamble the facts which induced the Crown to make the grant. The essential facts there set out are: That the Reverend Eleazer Wheelock had, many years before, set on foot, at his own expense and on his own estate, an Indian Charity School. Others had lent pecuniary assistance and the school had prospered to such an extent that it was thought advisable to raise funds in England, which was done, the funds being placed in the hands of certain trustees residing there. It further recited that Wheelock represented that he had authorized the English trustees to select a fitting location for the school, and had set before them the offers of grants of land that had been made by several of the governments in America; that a large number of proprietors of lands in western New Hampshire, considering that such a location would be advantageous for carrying out the work among the Indians, "and also, considering, that without the least impediment to the said design, the same school may be enlarged and improved to promote learning among the English, and be a means to supply a great number of churches and congrega-

tions, which are likely soon to be formed in that new country, with a learned and orthodox ministry, they the said proprietors have promised large tracts of land, for the uses aforesaid, provided the school shall be settled in the western part of our said province"; that the English trustees chose the same location; and that "the said Wheelock has also represented the necessity of a legal incorporation, in order to the safety and well being of said seminary, and its being capable of the tenure and disposal of lands and bequests for the use of the same." The charter then proceeded to incorporate Dartmouth College, making it "from henceforth and forever" a body corporate and politic, and giving the necessary corporate powers to carry out its purpose of instructing and educating the youth of the Indian tribes as shall appear necessary and expedient for civilizing and christianizing children of pagans, and also for the education of English youth and any others, including the power to appoint professors, tutors and various officers usually connected with such institutions, and to grant such degrees as were usually granted in either of the universities, or any other college of the realm of Great Britain. The officers, it was declared, might exercise their authority "as fully and freely as any of the officers and ministers in our universities or colleges in our realm of Great Britain lawfully may or ought to do." Eleazer Wheelock was recited to be the founder of the institution and was appointed its first president, with power to appoint his successor, who might, however, be removed by the trustees. It was made the duty of the president, in order that the English contributors might "be satisfied that their liberalities are faithfully disposed of," to transmit annually to the Trustees in England an account of the disbursements of the sums which he should receive from the donations and bequests made in England. The verdict then set out the acceptance of the charter, and that immediately after its organization the corporation received by gift, devise and otherwise lands, chattels and money, and that among the gifts to the college were a grant

of lands from the State of Vermont, in 1785, and two from the State of New Hampshire, in 1789 and 1807. The amending statutes are then set out and the proceedings involved in the action at hand are given, as we have already recited them.

From this statement of facts, found in the special verdict, it is clear that the purpose was to incorporate Moor's Indian Charity School, and that the method was to create an incorporated college and have the school funds transferred to it; and this is exactly the view that Marshall takes in his opinion.

Mr. Shirley, however, endeavors to show that the facts were quite different, and that the Chief Justice was well aware that they were. His argument on this point is, of course, based wholly on facts outside the record, nor is it clear that Marshall really knew of them. Nevertheless, we have endeavored to ascertain their importance, assuming, for the sake of argument, that they had been in the record.

Mr. Shirley marshalls the evidence and argues the matter at such length[4] that it will be impossible for us to do anything more than to state our conclusions, reached after reading his statement. He contends that Moor's Indian Charity School and the college were always regarded as separate institutions, even after the incorporation; that all the funds had been raised, prior to the incorporation, belonged to the school and were never given to the college; and that the first gift to the college was a large grant of land made by Governor Wentworth, in behalf of the Crown, in January, 1770, thus making the foundation of the institution a public one.

What Mr. Shirley does show, we think, is that the original intention (which is plainly shown in the preamble to the charter already set out) was to incorporate the charity school, with the idea that it would eventually broaden its operations—hence the name "college"; that the English trustees did not take kindly to these doings of Dr. Whee-

[4] Shirley, The Dartmouth College Causes, p. 20 ff., p. 412 ff.

lock, and that he, therefore, promised that the school funds should be kept separate, as before, and that the president of the school who, he said, was not necessarily the president of the college, should have the sole administration of the funds. As a matter of fact, the school funds must have been given to the college, as there was no such legal person as the school, and, in fact, we are told that gifts, which had been made to the school upon condition that it be incorporated, were called for immediately after the charter was granted. In 1807 we find the legislature passing an act which, after reciting that it had always been considered that the school and the college were separate branches of the same institution, with separate funds, and that the president of the college "ever has been and ever should be" president of the school, but that the trustees had never considered that they had any official right to be concerned in the application of the funds of the school, proceeds to associate the trustees with the president in that office. It is perfectly clear, therefore, that, legally, there never had been more than one institution, namely, Dartmouth College, and that Dr. Wheelock was taking an impossible position when he told the English trustees that the school funds were controlled by the president of the school, who was not, necessarily, president of the college. Mr. Shirley does show, however, that one of the first gifts to the college was a large grant of land by the Crown. Litigation threatened to arise later over the right of the Crown to make this grant, and the college therefore surrendered it, taking, two years afterwards, in 1789, the grant referred to in the special verdict as a substitute for the prior doubtful grant. This lends a semblance of validity to the claim made by Mr. Shirley that the foundation was a public one in the sense of the rule stated in Blackstone that, if the king and a private man join in endowing an eleemosynary foundation, "here the king has his prerogative," and therefore "the king alone shall be the founder of it."[5] It would seem probable that, in such

[5] Blackstone, 481.

a case, the king would have had the visitatorial power to the same extent as a private founder, and that, after the Revolution, this power might be said to have become vested in the state legislature—though in the case of so-called "civil" corporations, of which the king was always considered the founder, it was laid down that his visitatorial power could only be exercised by the court of King's Bench.[6] But it would be a question for serious consideration whether the visitor would have had the right to do what the legislature had attempted to do in the case of Dartmouth College.

The rules relating to the power of visitation were very technical, but, in view of the fact that the charity school was already founded and in existence and that the charter was intended to incorporate this school, and particularly, in view of the fact that Dr. Wheelock is named in the charter as the founder, thus evidencing an intention on the part of the Crown to waive its prerogative in the matter, we do not think the argument would have been applicable had all the facts which Mr. Shirley sets out appeared in the record.

Further criticisms of the statement of facts, as, for instance, that there was no formal application such as was suggested by Marshall's statement that there was an "application" made for a charter, are not of enough moment to need answering. It has also been pointed out that the power of giving degrees and the powers of the officers of the college were recited to be as comprehensive as those of the universities in England, with the object of proving that the College was really a university, and of following this up by showing that the universities were public corporations. It has already been shown, however, that there was no grand division of corporations, at common law, into public and private.

Having considered the questions which have arisen from the special circumstances surrounding the granting of this particular charter, it remains to consider the fundamental question of the case, namely, what was the status of cor-

[6] 1 Blackstone, 481.

porations at common law? Did the municipal law of England regard corporate franchises in the same light as it regarded other kinds of property? Can these grants fairly be said to have been considered to be contracts, according to the principles of the common law? And if it cannot quite be said that, upon common law principles, they were contracts, could it be said that they were contracts upon the principles of natural or universal law?

The fundamental principles of the law of corporations as they appear, practically unchanged, during the latter half of the eighteenth and the first half of the nineteenth centuries may be found in Blackstone's Commentaries, published in 1762; in Wooddeson's Lectures on the Laws of England, published in 1783; in Kyd on Corporations, published in 1793; and in Grant on Corporations, a work published somewhat later than these three (1850), yet which contains, practically unaltered, all the old law on this subject.

Referring to these authorities, we find that, as between the Crown and the recipients of its grants of corporate powers, the charter became a private, vested right. This plainly appears from the doctrines: that a charter is of no effect until it is accepted by the incorporators; that a new or amended charter is not effectual until it is accepted by the corporation;[7] and that the Crown cannot dissolve a corporation.[8] Grant says:

> The general principle of law with respect to grants being that the Crown cannot derogate from its own grant, it follows that when a charter has once been granted and accepted, the king cannot afterwards interfere with the operations of the provisions of it, or with the privileges, rights and liabilities that are incident to a corporation.[9]

In the leading case of The King v. Passmore,[10] Buller, J. said:

> I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the Crown and a

[7] Grant on Corporations, pp. 18, 19.
[8] Ibid., p. 10; 1 Blackstone, 485.
[9] Grant, p. 33.
[10] 3 T. R. 246.

certain number of subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place.

Again, it may be pointed out that a corporation is spoken of by Blackstone as a franchise.[11] A franchise, moreover, is classed as an incorporeal hereditament, that is, as property. The whole law of corporations is treated by Blackstone and other writers as a part of private law. Liberties, franchises and privileges were among the things mentioned in Magna Charta, of which a freeman should not be disseized, but by the judgment of his peers or the law of the land.[12]

The inference is, without doubt, clearly and strongly warranted that the franchise of being a corporation was a private, property right, and that, as such, it was regarded as sacred, as much guaranteed against parliamentary confiscation as any other property right of an individual, and hence, upon the principles of natural or universal law, nay, even upon the principles of the common law itself, could fairly be regarded as a contract, binding upon Parliament as well as upon the Crown. Clearly, the burden is shifted upon him who would prove the contrary.

These rules of the common law seem to furnish the only solid foundation for the court's decision, yet they receive quite varying treatment at the hands of the three Justices who delivered opinions in the case. Justice Washington relies on these rules more specifically than does either Story or Marshall. He sets them out in full to prove his first point—that a corporate charter is a contract. He then draws a distinction between public and private corporations, holding that the former are subject to legislative control whereas the latter are not. A college he finds to be a private eleemosynary corporation.

Washington, apparently, did not find it necessary to refute the argument that Parliament could not have been obligated by its contract since it was legally omnipotent.

[11] 2 Blackstone's Coms., 37.
[12] 1 Coke's Institutes, 47.

Story does not place any particular emphasis upon the specific doctrines which Washington relied on. He begins by describing a corporation as an artificial person, existing in contemplation of law, etc., and then launches into a disquisition upon public and private corporations. He reviews the doctrines as to the visitatorial powers of the founders of eleemosynary corporations, reviews the College charter, and determines that it is a private eleemosynary corporation. He then states, page 683:

> We are now led to the consideration of the first question in the cause, whether this charter is a contract within the clause of the constitution prohibiting any state from passing any law impairing the obligation of contracts,

and, after stating and explaining Fletcher v. Peck, says:

> It determines in the most unequivocal manner, that the grant of a State is a contract within the clause of the constitution now in question, and that it implies a contract not to reassume the rights granted. *A fortiori*, the doctrine applies to a charter or grant from the king.

Continuing, he discusses at some length the question of consideration, then the question—which none of the other justices discussed—as to how a corporation could be a contracting party to the sovereign act which creates it. This he follows with an answer to the criticism that there could be no contract between the State and the trustees because the latter had no private beneficial interest in the property, a point which he treats from various aspects and at great length. After meeting the objection that the charter was dissolved by the Revolution, he finishes the opinion by examining the acts of New Hampshire in question and pointing out how they impaired the obligation of the contract contained in the original charter, and here he brings in several of the rules which Washington relied on, as, for example, that a new charter cannot be imposed on a corporation without its consent.

Chief Justice Marshall argues quite differently from either Story or Washington. He opens the argument with this assertion, page 627:

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is found.

"Is this contract protected by the constitution of the United States?" he asks. "It is argued," he says, "that the clause was not intended to restrain the States from regulating their civil institutions." To this he is quite ready to agree. Therefore he says, pages 629, 630:

This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature may act according to its judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

As was his wont, Marshall cites practically no authorities. He examines the charter. It appears to be a private eleemosynary corporation. Do its objects stamp on it a different character? No; every schoolmaster is not a public officer. Nor does the source from which it derived its funds make it a public institution. Is it from the act of incorporation? This he likewise discusses on principle, until he asks the question: "Is it because its existence, its capacities, its powers, are given by law?" Because the government has given it power to take property may it interfere to direct how and for what purposes this property may be held? This he answers by asserting: "This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?" He then enters into the question, which he thinks the most difficult, as to who has sufficient interest in the property of the College to give him a standing in court. In so doing he makes the following rather interesting remark, page 643, in regard to the omnipotent power of Parliament, he being the only justice who has anything to say upon the subject:

> According to the theory of the British Constitution, their Parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had Parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet, then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed. In reason, in justice, and in law, it is now what it was in 1769.

He concludes this part of the argument by saying, page 643: "This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation."

"It is more than possible," he admits, "that the preservation of rights of this description was not particularly in the view of the framers of the constitution." Being within the words of the Constitution, however, it must be within its operation likewise, "unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception." But he finds that public policy does not demand that these institutions remain subject to legislative supervision.

The charter was therefore a contract protected by the United States Constitution. New Hampshire succeeded to the obligations of the Crown. And here he again touches upon the omnipotent power of Parliament. He says, page 651:

> By the revolution, the duties, as well as the powers of government devolved on the people of New Hampshire. It is admitted,

that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights, respecting property, remain unchanged by the revolution. The obligations, then, which were created by the charter of Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the constitution of the State. But the constitution of the United States has imposed this additional limitation, that the legislature of a State shall pass no act impairing the obligation of contracts.

The opinion ends with a demonstration that the acts of New Hampshire impaired the obligation of the contract.

The foregoing is, of course, but a bare outline of the arguments, and can give only an inadequate idea of Story's painstaking and exhaustive citation of authorities and of the exquisitely polished and effective argument of Marshall.

Marshall argued upon principle, not upon authority, and, as such, the argument is a very powerful one. The property donated to this college should not belong, he feels, either in justice or upon the ground of public policy, to the state; it is private property. But to allow the legislature to dissolve the corporation at its pleasure would work a forfeiture of this property.

In spite of the force of this reasoning, it seems that the question, how did the common law and the constitutional practice of England regard corporations, has such a direct bearing upon the issue raised in this case, even though the existence and obligation of the contract was to be determined upon principles of natural law, that more attention should have been paid to this point and a fuller citation of authorities should have been given by the Chief Justice. Granted, however, that the common law regarded corporate franchises as private property, similar in kind to other property, his attitude towards the omnipotent power of Parliament seems, for the reasons already explained, properly taken.

We are brought back therefore to the question, how were corporations regarded at common law? And we would again call to mind the rules that the Crown could not alter or repeal a grant of corporate powers, and that such grants were called franchises, which were incorporeal hereditaments, which were a species of private property.

It is said, however, that these doctrines only demonstrate the existence of a contract between the grantees and the Crown, and not the exisence of one between the grantees and Parliament. It is true, of course, that a contract obligatory upon the Crown only is proved; yet the fact that it was obligatory upon the Crown would suggest that it was not considered to be at the mercy of Parliament, and this is strengthened, as was said before, by the fact that franchises were spoken of as property. However, it is pointed out by Mr. Hill[13] that the common law writers especially recognized the power of Parliament to dissolve corporations. Corporations, he says, were political institutions as their very name (body *politic* and corporate) shows.

Kyd and Blackstone did seem to consider it necessary to assert that corporations could be dissolved by an act of Parliament. If by this they meant merely that Parliament could dissolve a corporation by virtue of its omnipotence solely, it does not affect our argument. If, on the other hand, they meant that Parliament had a special supervisory power over corporations, it strongly negatives the contract theory. Blackstone's statement rather infers the one view, Kyd's the other. Blackstone says: "A corporation may be dissolved by act of Parliament, which is boundless in its operations."[14] Kyd says, "That a corporation may be dissolved by act of Parliament is a consequence of the omnipotence of that body in all matters of political institution."[15] Kyd, it may be said, is a writer who displays a good deal of originality, and many of whose theories, therefore, are at

[13] 8 American Law Rev. 189.
[14] 1 Blackstone, 485.
[15] 2 Kyd, Corporations, p. 447.

variance with the accepted doctrines of that time. Thus he maintains that a corporation is not a mere invisible and intangible body existing only in contemplation of law, thus foreshadowing the newer theories on the subject, and also that it is not proper to speak of a charter as a franchise. The latter position was only adopted, however, upon the ground that a corporation was a person in itself, whereas a franchise was a transferable privilege existing only in the hands of some person—a corporation "is to a franchise as a substance to its attribute"—but, he says of the right of the members of the corporation to act in that capacity: "It is a right of such nature that every member, separately considered, has a free-hold in it, and all, jointly considered, have an inheritance which may go in succession. Natural persons, as such, are capable of taking and holding this right, which is not taken or held in their politic, but in their natural capacity."[16]

Besides the arguments which we have thus far considered, much stress was laid, in all three opinions, upon the fact that the college was a private corporation. This implied an admission that public corporations were subject to governmental regulation and control, and a claim that private corporations were not. If such a broad distinction was recognized at common law, the case is certainly proved in favor of the sanctity of the corporate rights of all private corporations.

This argument, it may be noted, was not treated in exactly the same way in all of the opinions. Marshall, for instance, did not claim that this distinction was recognized at common law. He simply said that the Constitution never intended to prohibit the States from regulating their civil institutions. He further argued that the fact of incorporation was immaterial in determining whether an institution was or was not a public or civil one: "The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the

[16] 1 Kyd, Corporations, p. 15.

objects for which they are created." In fact he did not use the words "public corporation," as distinguished from "private corporations," at all.

Story laid the greatest stress upon the distinction, and regarded it, apparently, as a well settled rule of the common law. We think, however, that he draws the distinction far more sharply than the authorities justified. The only real authority is the case of Phillips v. Bury,[17] which we shall shortly consider.

Justice Washington seems to state the matter with eminent fairness. He quotes the language of Lord Holt in Phillips v. Bury practically verbatim. In the original case it is as follows:

> And that we may the better apprehend the nature of a visitor, we are to consider that there are in law two sorts of corporations aggregate; such as are for public government, and such as are for private charity. Those that are for the public government of a town, city, nursery, or the like, being for public advantage, are to be governed according to the laws of the land; if they make any particular private laws and constitutions, the validity and justice of them is examinable in the king's courts; of these there are no particular private founders, and consequently no particular visitor. . . . But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and, therefore, if there be no visitor appointed by the founder, the law appoints the founder and his heirs to be visitors, who are to proceed and act according to the particular laws and constitutions assigned them by the founder.

"This right of government and visitation," continues Justice Washington, "arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it. The authorities are full to prove that a college is a private charity, as well as a hospital, and that there is, in reality, no difference between them except in degree; but they are within the same reason, and both eleemosynary. These corporations, civil and eleemosynary, which differ from each other so especially in their nature and constitution, may very well differ in matters which concern their rights and

[17] 2 T. R. 352.

privileges, and their existence and subjection to governmental control." He then endeavors to justify the distinction, but upon reason rather than upon authority.

It is noticeable that Washington is careful and conservative in his statement as to the doctrine of public and private corporations, and there was good reason for his being so. In the first place, the authority of Phillips v. Bury is conditioned by the question which was at issue in that case. There the court was dealing with the doctrine of the visitatorial power over corporations, and the question was whether the king's courts had jurisdiction to review the action of the visitor of a college who had deprived the rector of his office. Lord Holt held that they had no such power, and distinguished the case from that of public corporations, as to which the king's courts exercised a visitatorial power. He was far from saying, indeed could not have said, that the king could interfere in the government of these public corporations, nor did he say that Parliament was the proper body to supervise them. As Blackstone put it, the king was the founder of civil corporations, but his visitatorial power over them was only exercised through the king's courts. We agree, therefore, with Mr. Hill that Phillips v. Bury does not warrant the conclusion which Story drew from it, and that it does not of itself furnish authority for the general distinction taken by the court between public and private corporations. In the next place, as Mr. Hill points out, neither Hale,[18] Kyd, Blackstone, Wooddeson, Chitty[19] nor Stephen[20] draws any distinction between public and private corporations. The classification is always into aggregate and sole, ecclesiastical and law, civil and eleemosynary. Finally, it may be pointed out that the very case most relied upon to demonstrate the contractual relation between the Crown and its grantees, growing out of a grant of corporate powers,—the case of The King v. Passmore—involved the

[18] Hale, Analysis of the Law.
[19] Chitty on the Prerogative.
[20] Stephen's Commentaries on the Laws of England.

charter of a borough, and the language of Buller, J., heretofore quoted, was spoken of this charter. In fact, the doctrines that the Crown could not interfere with a charter once granted, and that charters were franchises, applied to borough charters as well as to the charters of other kinds of corporations.

This seems to put the reasoning of the court, at least of Story and Washington, in a rather difficult position. It was declared that public corporations had no contract rights in their franchises, but that private corporations did have. Yet the very precedents cited to prove that the charters of private corporations were regarded as private property apply equally to public corporations. To declare that all charters were irrepealable and unamendable by the legislature was an impossibility, in view of the established practise in this country giving the legislature full control over public or municipal corporations. To declare that all corporations were subject to legislative control would have necessitated an affirmance of the decision of the New Hampshire court.

It seems correct to say that the common law did not draw the clear distinction between private and public corporations which Story attributed to it; all corporations were treated as of the same genus and species. But as between the two conceptions of public institution and private property, it may fairly be said that corporations were placed in the latter class, as we have already shown in part and shall show more fully hereafter. The criticism of this distinction is, therefore, not of any particular importance.

There is one more authoritative source, to which we have not yet turned, and which, as we have already noted, is of especial importance, in a state whose legislature is legally omnipotent, in estimating the nature and sanctity of private rights, namely, the legislative usage in regard to these rights.

The actual precedents which we are about to review are not entirely clear. They lend themselves to conflicting interpretations. But although this is the case, it nevertheless suggests another consideration which should not be over-

looked. The question to which we are seeking an answer is: Were corporate franchises private property? In its last analysis this depends, in a state where the legislature is omnipotent, upon the way in which such franchises were generally regarded at the time they were granted, and Justice McKenna's observation, in his dissenting opinion in Blair v. Chicago,[21] in which he was endeavoring to determine the true construction of a contract made by one of the States, that "whatever we may profess, it is not easy to realize the conditions, thoughts and purposes of another time," is peculiarly applicable to the case at hand. Marshall, Story and Washington were much closer to the thought and feeling of the common law of the eighteenth century than we are to-day, and there is a reasonably strong presumption that they interpreted its spirit correctly in this instance.

Judge Bartlett, in his very able argument before the Court of Appeals of New Hampshire, maintained that corporations had always been regarded as subject to regulation by Parliament, as was shown, he said, by actual precedents.[22] Bartlett argues:

> When the nation was dissatisfied with the operations of the land bank and south-sea scheme, no difficulty existed for want of power in parliament to take away their charters and even make the members individually liable for bills.[23] In the time of Henry Sixth a statute was passed by which all corporations and licenses granted by that prince were declared to be void.[24] Monopolies granted by charter are always abolished by parliament when thought proper.[25] So the fee for admission into trading companies is altered almost yearly by parliament, although much against the inclination of the corporators; as also the qualifications and number of members.—In the 23rd of Geo. II. a corporation was established for trade to Africa, with great detail in its rights, privileges, etc. and by statute the fort of Senegal with all its dependencies had been vested in it;

[21] 201 U. S. 401 at 501.

[22] This point, so far as appears from the printed report, was barely touched upon in the Supreme Court. The argument for the new trustees, which was made in that court by different counsel, was, it must be admitted, far inferior to the arguments presented for the same side in the court below.

[23] 5 Rus. Mod. Eu. 14.

[24] Bac. Abr. Stat. F. 18.

[25] 1 Tm. W. M. 181.

still in the 5th of Geo. III. parliament thought proper, on much deliberation and after much opposition, to take from their jurisdiction that fort and a large extent of coast, vest it in the crown and declare the trade thither free to all his majesty's subjects.—Indeed for proof that parliament have controuled, altered, and even abolished corporations at their pleasure, it cannot be necessary to refer to particular cases, while no book upon the subject can be found that does not recognize the principle.[26] But if examples of a college are necessary, among many others, that of Manchester college may be noticed, where parliament took from a special visitor the power of visitation and vested it in the crown by the 2d of Geo. II.[27] Also the case of Rex & Reg. vs. St. John's College, where by statute of 1 W. & M. for abrogating the oaths of allegiance and supremacy, it was provided that the office of head or fellow of a college in either university should be vacated if the incumbent refused the new oath.[28]

In this country too our provincial assemblies exercised the same power and often changed the whole organization of such institutions.—An act was passed in Connecticut in 1723 without petition or consent of the corporation "For the more full and complete establishment of Yale College, and for enlarging its powers and privileges." By this act, the number of trustees was enlarged, new offices created, and new regulations made with regard to the number which should constitute a quorum.[29]

By an order of the general court of the province of Massachusetts, 1673, an addition was made to the members of the corporation of Harvard College, against the will of the corporation.[30] In 1784, the charter of Trinity church in New York, with regard to induction was repealed by the legislature.[31] To these might be added many other instances, (as 3 John. Rep. 127–151, &c.) But I will here leave the question as to the subjection of corporations to the general legislative power with an offer to abandon the defence when one unequivocal authority shall be produced by the plaintiffs to show that the exercise of such power by the legislature of Great Britain was ever adjudged illegal.[32]

With the exception of the South Sea Company, the other "bubble" companies were not corporations at all. The Bubble Act passed by Parliament was for the suppression of all those pretending to act as a corporation; and the South Sea Company was especially excepted from its provisions.[33] The statute of Henry VI referred to is indeed mentioned in several reported cases, but an examination of

[26] 2 Term. Rep. 533—8 Term. Rep. 430—Doug. Rep. 637.
[27] 4 Term Rep. 236–237, 244; 2 Term Rep. 318.
[28] 4 Mod. Rep. 233.
[29] 2 Doug. Summary, 183.
[30] 1 Hutch. Hist. 159.
[31] 9 Johns. Rep. 127.
[32] 65 New Hampshire Rep. 573–574.
[33] Carr, the Law of Corporations, p. 108; Select Charters of Trading Companies, vol. xxviii, Selden Society Publications, p. cxxxi.

the statutes has failed to disclose it.[34] The act of 2 Henry VI, chap. 1, confirmed all existing franchises. The argument as to monopolies is not in point, the charter in question not being a monopoly. The case of the African Company seems to be a misleading citation. This company seemed to have no private right in the forts.[35]

The case of Manchester College is not in point because the act of Parliament was in this case passed to avoid the difficulty of a vacancy in the office of rector caused by the disqualification of the incumbent. The oath referred to which was required of heads and fellows of colleges was merely a general oath of allegiance such as might have been required of every person. As to the precedent with regard

[34] The Statute is referred to in these cases as a private statute, and possibly for that reason it is not found in the Statutes of the Realm.

[35] The corporation which was divested of the forts was the successor of the Royal African Company of England, but it was a corporation of a very peculiar nature. The act of 25 George II, chap. xl, which repealed the charter of the Royal African Company, which had gotten into financial difficulties, recited that that company was willing to surrender its lands, forts, cannon, etc. and its charter, and appropriated about ninety thousand pounds towards paying the creditors of the company and about twenty-three thousand pounds as a payment to the owners of the stock. The new company was named The Company of Merchants Trading in Africa. It was a non-stock company. Any merchant trading in Africa could become a member by paying forty shillings. It could not trade in its corporate capacity. The managing committee of the company was subject to the supervision of the government commissioners for trade who could remove the committee members, and the committee had to submit annual accounts to the Exchequer and to Parliament. Finally the forts and settlements were given to the Company not for its own proper use and behoof, but "to the interest and purpose that said forts, settlements and premises shall be employed at all times hereafter, only for the protection, encouragement and defense of said trade." The repealing act of 5 George III, chap. xliv, recites this purpose and declares that it will be better fulfilled by vesting the forts in the Crown. The Royal African Company had been given an exclusive grant for a certain period. "When this period expired," says Mr. Carr, "the House resolved that the trade ought to be free, that forts and settlements ought to be enlarged and maintained by a charge borne out of the trade, that the plantations must be sufficiently supplied with negroes at reasonable rates, and that a large stock was necessary. The company protested its legal right in the forts under a grant from the Crown, and the threatened Bill did not pass." (Selden Society, Publications, vol. xviii, Select Charters of Trading Companies, Introduction, p. 48.) This shows the difference in nature between the two companies.

to Yale College, we have not examined the reference and are not able to comment, except to say that the college is not alleged to have opposed the amendment. A reference to Hutchinson's History of Massachusetts does not disclose that the amendment to the charter of Harvard College was made against the will of the corporation, nor does this element appear in regard to the amendment of the charter of Trinity Church.

Mr. Sullivan, arguing for the same side, gave the following instances of legislative interferences with chartered rights:

> The legislatures of many of the states, perhaps of all of them, have taken from private corporations some of their rights and privileges, when the welfare of the community has required it. In this state it has often been done.—The New Hampshire Bank made some of its bills payable in Philadelphia. The General Court passed an act declaring that after a certain day "it should be unlawful for any Banking company in this state, by themselves, their directors or agents to issue any bank bill or bank note payable at any other place, than at the Bank from which it is issued."[36] Every Banking company that acted in violation of this law, was subjected to a penalty of one hundred dollars for each offence. The New Hampshire Bank had a right, by its charter, to make its bills payable in Philadelphia, or New York, or at any place whatever. The act prohibiting this, was an alteration of its charter, as much as if it had been entitled, an act to alter and amend the charter of the New Hampshire Bank. Yet it has never been suggested, that the legislature had not power, by the constitution, to pass the law. In many other instances, the General Court has deprived banks of rights conferred on them, and in effect, altered their charters. By an act passed in June, 1807,[37] Banks were forbidden to issue bills, which were not payable on demand and to bearer; or which were subject to any condition. Every Bank, existing in the state at the time when this law was passed, had a right by its charter to make its bills payable at a future day—to order—and subject to conditions. The law, depriving Banks of these rights, has never been considered as repugnant to the constitution. It has not unfrequently happened that the legislatures of those states, in which Banks have been established, have prohibited their passing bills under certain denominations. Thus, the General Court of Massachusetts in June, 1799, made a law, that no Bank, incorporated by the legislature of that Commonwealth, except the Nantucket Bank, should issue any notes for a less sum than five dollars.[38] By their charters they had a right to issue bills of any denomination. This law deprived them of that right.
>
> The General Court have not only imposed new duties on Banks,

[36] State Laws, 283.
[37] Ibid.
[38] Mass. Laws, 884.

but have added heavy penalties, to enforce the performance of them. By an act, passed in June, 1814, the directors of the several Banks in this state are obliged to make returns of the situation of their respective Banks, annually, to the Governor and Council; and in case of neglect or refusal, the Banks are subjected to a penalty of one thousand dollars.

The General Court of Massachusetts passed a law, by which all the Banks within the Commonwealth were subjected to a penalty of two per cent. a month, on the amount of those of their bills, which should not be paid, when presented for payment. An action was commenced against the Penobscot Bank to recover the amount of certain bills, presented for payment, but which were not paid; and also to recover two per cent. a month on that amount. It was contended on the part of the Bank, that the law was unconstitutional. But the Court recognized the authority of the legislature to make it. It was, say the Court, "A duty incumbent on the legislature to pass the law, and this the rather, as these corporations derive all their powers from legislative grants."[39] In this case the Court recognizes the authority of the legislature, to superintend corporations of a private nature, and to impose penalties upon them for not performing those duties, the neglect of which produces mischief to society.—They hold, that as these corporations derive all their powers from legislative grants, it is not only the right, but the duty of the legislature to see that the Commonwealth receives no detriment.[40]

Practically all of these acts were general acts regulating particular phases of the banking business, and none of them necessarily impaired any charter provision, nor is it at all likely that they did so. Again, if any of them did impair charter grants, it is not apparent that they were ever brought before and sustained by the courts.

Angell and Ames, in their treatise on private corporations, cite the case of the dissolution of the Knights Templars in the reign of Edward II. It appears from Kyd, however, that this body was incorporated by the Pope and had been dissolved by one of his successors some years before the act of 17 Edward II was passed judging that the Templars were well dissolved and conferring the property of the order upon the Knights of St. John.[41]

A precedent which cannot be evaded, however, is the case of the dissolution of the monasteries in the time of Henry VIII, and the subsequent confiscation of their property. The case was apparently considered a very excep-

[39] 8 Mass. Rep. 445.
[40] 56 New Hampshire Reports, pp. 506, 507, 508.
[41] 2 Kyd, Corporations, p. 446.

tional one, and could hardly have been regarded as furnishing a precedent for ordinary times.[42]

A second case of interference was the passage of the "Corporation Act" in the reign of Charles II. This act "enjoined all magistrates and persons bearing offices of trust in corporations to swear that they believed it unlawful, on any pretense whatever to take arms against the king, and that they abhorred the traitorous position of bearing arms by his authority against his person or against those that are commissioned by him. They were also to renounce all obligation arising out of the oath called the solemn league and covenant; in case of refusal to be immediately removed from office. Those elected in the future were, in addition to the same oaths, to have received the sacrament within one year before their election according to the rites of the English church."[43] Yet it is by no means apparent that these two cases of Parliamentary interference sufficed to estab-

[42] Thus Hallam writes of the confiscation of the property of the monasteries: "A few more were afterwards extinguished through his (Woolsey's) instigation; and thus the prejudice against interference with this species of property was somewhat worn off, and men's minds gradually prepared for the sweeping confiscations of Cromwell. The king indeed was abundantly willing to replenish his exchequer by violent means, and to avenge himself on those who gainsayed his supremacy; but it was this able statesman who, prompted both by the natural appetite of ministers for the subject's money, and, as has been generally surmised, by a secret partiality towards the Reformation, devised and carried on with complete success, if not with the utmost produce, a measure of no inconsiderable hasard and difficulty. For such it surely was, under a system of government which rested so much on antiquity, and in spite of the peculiar sacredness which the English attach to all freehold property, to annihilate so many prescriptive baronial tenures, the possessors whereof composed more than a third part of the house of lords, and to subject so many estates which the law had rendered inalienable, to maxims of escheat and forfeiture that had never been help applicable to their tenure. But for this purpose it was necessary, by exposing the gross corruptions of monasteries, both to intimidate the regular clergy, and to excite popular indignation against them." Hallam, Constitutional History of England, vol. i, pp. 70–71.

[43] Hallam, Constitutional History of England, vol. ii, pp. 27–28. The object of the act was to oust the dissenters from the corporation and to place the royalists in control.

lish the doctrine that corporations had no private rights in their franchises.

There is a rather interesting passage to be found in Browne's Civil and Admiralty Law, published in 1802. Browne says: "Corporations were dissolved at Rome by the prince, by death, by surrender, by forfeiture. So with us, corporations may be dissolved by act of Parliament, whose power is said to know no limits, but is on them very sparingly and cautiously exercised."[44]

Turning to a recent writer upon the origin and development of corporations, we find the author remarking that "the body of principles apparently necessary for the regulation of their relations have been attached to the main body of English Law by means of fictions." For this reason, he explains, the historian and jurist have always had difficulty in knowing how to treat them: "It has always been a question whether they were public or private in nature, or whether they were divisions of the state or associations of citizens—a matter of importance in technical analysis."[45] Further he says:

> The maturity of the conception of corporations in the English Law was undoubtedly facilitated by the development of the corporations themselves. It was not entirely fortuitous that the conception of corporations as artificial persons was nearly coincidental with the completion of the process of "shrinkage" of corporations from entire communities to smaller select bodies within them. The close bodies in guilds and municipalities were crystallizing during the fourteenth and fifteenth centuries. It was when they ceased to derive their life from the communities themselves and appeared to enjoy an existence independent of them, not in harmony with them but rather in opposition and contrast to them, that their distinct personality emerged. Moreover, the development facilitated the substitution of the private for the public view that might be expected to be taken of the communities. The close bodies as well as the rest of the community regarded the powers reposed in them largely as sources of private advantage; the state was accordingly much more readily inclined to assign them to the department of private law than to that of public law. The nearer they approached the plane of private persons in their activity, the easier it was for the jurist's imagination to impute personality to them.[46]

[44] Browne, Civil and Admiralty Law, p. 148.
[45] Davis, Origin and Development of Corporations, vol. ii, p. 239.
[46] Ibid., p. 294.

This, it may be observed, was spoken concerning the boroughs. The later history of the boroughs and the state of corruption into which they fell is well known. The borough franchise must indeed have appeared to be private property when it was possessed by a close, self-perpetuating body of men within the larger community which constituted the borough itself. The struggles of the boroughs against the attacks on their charters made by Charles II and James II must also have tended to intensify feeling of proprietorship among the possessors of the borough franchises.

There is perhaps another aspect of the borough franchises which affords better evidence of their proprietary nature. Even before the corporate idea was clearly formulated the boroughs possessed many franchises obtained chiefly by charters from the king. These franchises were the chief earmarks of the borough and they were largely political in their nature—the right to their own court, to the *firma burgi,* to be free from tolls, etc. But at the time of which we are speaking, society was based upon the feudal system. The land was full of franchises. Political and proprietary rights were everywhere commingled, but commingled in such a way that the proprietary side was by far the more conspicuous. These feudal privileges of the boroughs gave the king a good deal of control over them, yet even the king did not claim the right arbitrarily to despoil them of their privileges. And the king in those times was clothed to a much greater degree with the sovereign power of the state than he later became, when the power of Parliament expanded to his detriment.[47] After describing the various franchises of the boroughs, Pollock and Maitland continue: "Such in brief were the main franchises that the borough enjoyed, and these franchises, some or all of them, made the borough to be a borough. This gave the king a tight hold upon the townsfolk. The group of burgesses was a franchise-holder in a land full of franchise-holders, and had to submit to the rules which governed the other

[47] 1 Pollock v. Maitland's History of English Law, 2d ed., p. 668.

possessors of royal rights. It might lose its privileges by abuse or non-use; it might lose them by not claiming them before the justices in eyre, though in this case a moderate fine would procure their restoration."

Tracing the development of the corporate idea, Pollock and Maitland note the change of the boroughs into something bearing the resemblance of a gild—the phase of development upon which Mr. Davis laid stress in the passage we have quoted above. It is interesting to note one of the causes which these writers give for this change. "In the great boroughs," they say, "large sums of money were subscribed in order that privileges might be bought from the king, and the subscribing townsfolk naturally conceived that they purchased those privileges for themselves. Some definition of the privileged, the franchised, body was necessary, and yet in the great boroughs that body could not assume any of the old accustomed forms.[48]

It would seem that it was this feeling of the proprietary nature of the borough franchises which preserved the boroughs untouched until long after their usefulness had ceased and, indeed, until long after their corruption was a matter of general recognition, for it was not until 1835, sixteen years after the decision in the Dartmouth College case, that their reform was actually accomplished.

There are some who have commented upon the College case who have used the argument that the court decided the controversy upon musty old English precedents rather than upon the liberal principles which inspired the common law upon its transplantation to this country. They claim that the existence of special privileges of any kind was contrary to the genius of our laws. In so arguing they admit, of course, the correctness of the decision, judged by English precedents. Judge Corwain, of the Supreme Court of Ohio, in an opinion delivered in the well known case of Knoup v. Piqua Bank,[49] takes this position, and in so doing

[48] Ibid., p. 670.
[49] Decided in 1850; 1 Ohio St. 603, 616.

calls attention to the proprietary nature in which offices were long regarded in England. He says:

> It is plain that many things are the subject of a franchise, in England, which are not such in this country. The best illustration of this perhaps, will appear by comparing the nature of an office in England, and an office in America. An office, like a franchise, is a royal gift. It is considered property, in England. Some offices are estates in fee simple, or fee tail; some estates for life, and some only estates at will. Cruise's Digest, Volume iii, Title 25. There are some offices, also, which are said to be estates for a term of years, or for one year. And ministerial offices may be in reversion, or to commence at a future period. Some offices are even assignable by deed. But, in America, an officer is only a public agent or trustee, and has no proprietorship, or right of property, in his office.

Another important authority which has been a good deal cited—it is one upon which Mr. Hill, in the article heretofore referred to, lays much stress—is the argument which Edmund Burke made in the year 1783 upon Mr. Fox's bill to repeal the charter of the East India Company. The bill was not passed and the charter therefore was not repealed, and so was in full force at the time the College case was decided. Mr. Hill contends, however, that the failure of this bill to pass was not in the least due to the respect entertained for the chartered rights of the company, and he maintains that the argument of Burke correctly represents the position of corporations at that time. Mr. Hill's quotation is a long one, but it necessitates our making a still longer one, for the reason that it seems that there is a qualifying and underlying conservatism in this argument of Burke's which Mr. Hill does not see, and which the portions which we have added serve to emphasize.

Webster, in his argument before the Supreme Court, had differentiated the case of the East India Company upon the grounds that it had been granted the widest sort of political dominion and that it had grossly abused its privileges, and these distinctions were evidently suggested by Burke's speech.

Burke argued as follows: "As to the first of these objections; I must observe that the phrase of the chartered rights of men is full of affectation; and very unusual in the dis-

cussion of privileges conferred by charters of the present description. But it is not difficult to discover what end that ambiguous mode of expression so often reiterated is meant to answer." He proceeds then to speak of the natural rights of man. These are indeed sacred things. If they are further affirmed and declared by express covenants, they are in a still better condition; "they partake not only of the sanctity of the object so secured, but of that public faith itself which secures an object of such importance." And here he refers to Magna Charta and similar documents. "These charters," he continues, "have made the very name of the charter dear to every Englishman. But, sir, there may be, and there are charters, not only different in their nature, but formed on principles the *very reverse* of those of the great charter. Of this kind is the charter of the East India Company. Magna charta is a charter to restrain power, and to destroy monopoly: the East India charter is a charter to establish monopoly and to create power. Political power and commercial monopoly are not the rights of man; and the rights to them derived from charters, it is fallacious and sophistical to call the chartered rights of men. These chartered rights (to speak of such charters and their effects in terms of the greatest possible moderation) do at least suspend the natural rights of mankind at large; and in their very frame and constitution are liable to fall into a direct violation of them."

It is a charter of the latter description (that is to say a charter of power and monopoly) which is affected by the bill before you. The bill, Sir, does, without question, affect it; it does affect it essentially and substantially. But having stated to you of what description the chartered rights are which this bill touches, I feel no difficulty at all in acknowledging the existence of those chartered rights in their fullest extent. They belong to the company in the surest manner, and they are secured to that body by every sort of public sanction. They are stamped by the faith of the king; they are stamped by the faith of parliament; they have been bought for money; for money honestly and fairly paid; they have been bought for valuable consideration, over and over again.

I therefore freely admit to the East India Company their claim to exclude their fellow subjects from the commerce of half the globe. I admit their claim to administer an annual territorial reve-

nue of seven millions sterling; to command an army of sixty thousand men; and to dispose (under the control of a sovereign, imperial discretion, and with the due observance of the natural and local law) of the lives and fortunes of thirty millions of their fellow creatures. All this they possess by charter, and by acts of parliament (in my opinion) without a shadow of controversy.

Those who carry the rights and claims of the company the furthest, do not contend for more than this; and all this I freely grant. But granting all this, they must grant to me, in my turn, that all political power which is set over men, and that all privilege claimed or exercised in exclusion of them, being wholly artificial, and for so much a derogation from the national equality of mankind at large, ought to be some way or other exercised ultimately for their benefit.

If this be true with regard to every species of political dominion, and every species of commercial privilege, none of which can be original, self-derived rights, or grants for the mere private benefits of the holders, then such rights, or privileges, or whatever else you choose to call them, are all in the strictest sense a trust; and it is of the very essence of every trust to be rendered accountable, and even totally to cease, when it substantially varies from the purposes for which alone it could have a lawful existence.

This, I conceive, sir, to be true of trusts of power vested in the highest hands, and of such as seem to hold of no human creature. But about the application of this principle to subordinate, derivative trusts, I do not see how a controversy can be maintained. To whom then would I make the East India Company accountable? Why to parliament, to be sure, to parliament from which their trust was derived, to parliament, which alone is capable of comprehending the magnitude of its object, and its abuse, and alone capable of an effective remedy. The very charter which is held out to exclude parliament from correcting malversation with regard to the high trust vested in the company is the very thing which at once gives a title and imposes a duty on us to interfere with effect wherever power and authority originating from ourselves are perverted from their purposes, and become instruments of wrong and violence. That the power notoriously, grossly abused has been bought from us is very certain. But this circumstance, which is urged against the bill, becomes an additional motive for our interference; lest we should be thought to have sold the blood of millions of men for the base consideration of money; we sold, I admit, all that we had to sell, that is, our authority, not our control. We had not a right to make a market of our duties.

I ground myself therefore on this principle—that if the abuse is proved, the contract is broken; and we reënter into all our rights; that is, into the exercise of all our duties.

Again he says:

The strong admission I have made of the company's rights (I am conscious of it) binds me to do a great deal. I do not presume to condemn those who argue *a priori*, against the propriety of leaving such extensive political powers in the hands of a company of merchants. I know much is, and much more may be, said against such a system. But with my particular ideas and sentiments, I cannot go that way to work. I feel an insuperable reluctance in giving my

hand to destroy any established institution of government, upon a theory, however plausible it may be. . . . To justify us in taking the administration of their affairs out of the hands of the East India Company, on my principles, I must see several conditions. 1st, The object affected by the abuse should be great and important. 2nd, The abuse affecting this great object ought to be a great abuse. 3rd, It ought to be habitual and not accidental. 4th, It ought to be utterly incurable in the body as it now stands constituted. All this ought to be made as visible to me as the light of the sun before I should strike off an atom of their charter.[50]

It thus seems that Burke was far from asserting that the chartered rights of the company were held at the good pleasure of Parliament. When he says: "I ground myself on this principle—that if the abuse is proved, the contract is broken," he admits very plainly the existence of a contract between Parliament and the company. If it is contended that this contract cannot, under his theory, be a contract upon the principles of municipal law, it nevertheless completely meets the requirements for a contract upon the principles of natural law. Upon his theory, it is true, Parliament, contrary to the rule laid down for the Crown, would have the right to repeal its grants when they were abused without having to appeal to the courts to enforce a forfeiture. Such a doctrine was not, however, incompatible with the existence of a contract upon principles of natural law. Moreover it could not, of course, have been argued that Parliament would have to obtain the sanction of the courts before exercising its rights. At all events, Burke seems to recognize enough of a contract to warrant applying the prohibition of the "contracts clause" to it.[51]

[50] Burke's Works (Boston, 1826), vol. ii, p. 266 ff.

[51] We might note that, although the generally accepted doctrine in this country seems to be that a State must apply to the courts to have a forfeiture of chartered franchises enforced, it is difficult to see why a legislative act repealing misused or non-used franchises should be denied effect by the courts, if the fact of misuser or non-user be shown; that is, it is difficult to see why the state should be compelled to go through the proceeding of judicially declaring a forfeiture, if a cause for forefeiture actually exists. In the case of Given v. Wright, 117 U. S. 648, the court said that they could see no reason why the government could not take the benefit of the presumption of the surrender of a franchise by its non-user for a period of say thirty years without taking judicial proceedings for forefeiting the same. The preponderance of the evidence seems to us to be

But we have not entirely exhausted the authorities which the court had, or might have had, to rely upon, and we wish to complete the list in order to show just what was the strength of the court's position.

In 1785 James Wilson published an argument, which he had made as counsel, in opposition to the repeal by the legislature of Pennsylvania of the charter which a prior legislature had granted to the Bank of North America. Although we have already quoted the argument at length, it sets out so clearly and at such an early day the doctrine that a charter was a contract that it seems worth while to quote again some of the pertinent language. After remarking that generally speaking a state must have the power to repeal its own laws, he says:

> Very different is the case with regard to a law by which the state grants privileges to a congregation or other society. Here two parties are established, and two distinct interests subsist. Rules of justice, of faith, and of honor must, therefore, be established between them: for if interest alone is to be viewed, the congregation or society must always be at the mercy of the community. . . . For these reasons, whenever the objects and makers of a instrument, passed under the form of a law, are not the same, it is to be considered as a compact and interpreted according to the rules and maxims by which compacts are governed.[52]

And James Wilson, the reputed author of the "contracts clause," was considered one of the most learned members of the Constitutional Convention, and was later a member of the Supreme Court of the United States.

Again, in an early Massachusetts case, the following statement was made by Chief Justice Parsons: "We are also satisfied that the rights legally vested in this, or in any

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very strongly in favor of the view that the common law regarded corporate franchises as private property rights. And therefore we think it may fairly be said that a charter involved a contract not to repeal it, both upon common law principles and upon natural law principles. And if the common law, or the constitutional practice of the period under discussion, did distinguish between public and private corporations, and between the security with which they held their privileges, we think it safe to say that the age which Dicey calls that of "Blackstonian optimism" and "Eldonian toryism" would not have repudiated the doctrines as to private corporations which Marshall, Story and Washington attributed to it.

[52] Wilson's Works, ed. Adrews, p. 565.

corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation."[53]

In the case of Terrett v. Taylor,[54] decided in 1815, Justice Story delivered an opinion in which he said that the state legislatures had no authority to repeal the charters of private corporations, although the same could not be said of public corporations. The facts of the case are peculiarly complicated, and we shall therefore not examine them here. It will suffice to say that it is a very close question whether the remarks of Story concerning the power of the legislature over corporate charters were or were not *obiter,* but the probabilities are that they were not. The case came up from the District of Columbia and involved the question of the effects of certain acts of the legislature of Virginia. Story, therefore, was not confined to the "contracts clause" as the sole basis for the decision. Story said:

> How far the statute of 1786, ch. 12, repealing the statute of 1784, ch. 88, incorporating the episcopal churches, and the subsequent statutes in furtherance thereof of 1788, ch. 47, and ch. 53, were consistent with the principles of civil right or the constitution of Virginia, is a subject of much delicacy, and perhaps not without difficulty. It is observable, however, that they reserve to the churches all their corporate property, and authorize the appointment of trustees to manage the same. A *private* corporation created by the legislature may lose its franchise by a *misuser* or a *nonuser* of them; and they may be assumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture.—This is the common law of the land and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished. In respect, also, to *public* corporations, which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural jus-

[53] Wales v. Stetson, 2 Mass. 134 at 156. 1806.
[54] 9 Cranch, 43.

tice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals in resisting such a doctrine.[55]

Finally, it may be noticed that the Court of Appeals of New Hampshire, in deciding in favor of the new trustees, rested their holding solely upon the ground that colleges were public corporations, and admitted that the charter of a private corporation was inviolable. Again, the counsel for the new trustees, in their arguments before the New Hampshire court, laid far more stress upon the point that the corporation was a public one than upon the point that all corporations were subject to governmental control, and in the Supreme Court, counsel for the new trustees relied exclusively upon the former argument.[56]

There remains, therefore, to be considered the grounds upon which it has been contended that Dartmouth College should have been classed as a public corporation. The argument of the Supreme Court of New Hampshire upon this point is based almost entirely upon the proposition that the trustees of the college had no private interest which they could assert—surely a most narrow and technical method of reasoning. But the underlying idea of the opinion rather clearly appears to be that when property has been given to found institutions such as colleges and hospitals, the donors loose all private interest in the property, which becomes subject to the legal control of the state. Although disclaiming that they base their decision in the slightest degree upon expediency, the court devote the last two pages of the opinion to a justification of their position from the standpoint of public policy. And, indeed, the argument is very forci-

[55] 9 Cranch, 51–52.

[56] The New Hampshire court said: "It becomes, then, unnecessary to decide in this case, how far the legislature possesses a constitutional right to interfere in the concerns of private corporations. It may not, however, be improper to remark, that it would be difficult to find a satisfactory reason why the property and immunities of such corporations should not stand, in this respect, on the same ground with the property and immunities of individuals." See 65 N. H. Reps. 631.

bly put, and in a style which Marshall himself could hardly have improved upon.

But the court had no precedents to cite upon the point that the trustees had no rights which they could assert in a court of law. After all, that really depended upon the question whether any one had a beneficial interest in the property which they could have asserted, for, if there was any such beneficiary, surely the trustees could have asserted his rights for him.

On this larger question, also, we think it rather clear that the spirit of the common law was more truly interpreted by the Supreme Court of the United States than by that of the State. The state court's abstract reasoning to the effect that property given for these public purposes becomes essentially public property strikes one with some force in these times, but the court failed to cite any authorities to sustain its contention. Although the common law did distinguish between public and private charities, basing the distinction upon the inclusiveness or exclusiveness of the designation of the cestuis qui trust, it continually spoke, as we have seen from Phillips v. Bury, and as appears from other cases, of colleges and hospitals as private eleemosynary corporations, and the whole law as to founders and their visitatorial power is strong evidence that these corporations, whatever others may have been, were regarded as private in their nature. Then again, as Chief Justice Doe of New Hampshire has pointed out, this doctrine would have to be applied to all charitable trusts, whether they are incorporated or not; and yet it has never been supposed that the legislature could appoint trustees of its own to administer charitable trusts or associate them with existing trustees, nor have our legislatures ever undertaken the administration of charitable trusts. This has always been left to the judiciary.[57]

It is arguable that public educational institutions do essentially belong to the public and should be subject to public control, and the opinion of the New Hampshire court is an

[57] Harv. Law Rev. 169–170.

excellent example of such an argument; but nothing is plainer than that this conception has not yet been accepted by the law of this country.

The contention has been made that Dartmouth College was essentially a university, and that universities, as distinct from colleges, were public corporations. Oxford and Cambridge, it is true, were regarded as somewhat different in their nature from the colleges of which they were composed. They were civil corporations, whereas the colleges were eleemosynary. They enjoyed certain political powers, including the right to representation in Parliament, but as has been seen, even they can not be regarded as public corporations at common law. Also, it would hardly have been proper to class Dartmouth College as a university merely because it had been given the power of awarding degrees. It had none of the other powers of universities. The clauses in its charter giving its officers the same powers as similar officers in the universities of England can hardly afford the foundation for any inferences as to its character as a university when it was distinctly designated in the charter as a college. This argument is not considered by any of the justices of the Supreme Court in their opinions.

We have endeavored to show, in the first part of this chapter, that, by the weight of authority then existing, the ruling of Fletcher v. Peck that a grant was a contract involving an obligation was a proper ruling. We have endeavored to show, in the second part of the chapter, that the ruling of Fletcher v. Peck that a state was bound by its grants, was also consonant with the generally accepted doctrines of that day. We believe that these conclusions are fairly supported by the evidence, but, in any event, these rulings, whose validity we have been discussing, had been fixed in our law by Fletcher v. Peck and were hence established principles by the time that Dartmouth College v. Woodward came up for decision. If grants by a state were contracts, all that needed to be done in the College case, as Story pointed out, was to find out whether a charter was

considered as granting a private, property right. We have just seen that there was a preponderating weight of authority to support the affirmative of this proposition.

There was also the matter of the omnipotent power of Parliament to be considered. It would not seem that the mere existence of an omnipotent power should have or did bother the counsel for the college. It was given almost no discussion in either court. Parliamentary omnipotence could repeal a land grant or confiscate a man's property, yet these proceedings would have been condemned as unlawful and unconstitutional. But the question as to what extent this Parliamentary omnipotence actually was used in the case of corporations did have a very important bearing upon the nature of corporate franchises, that is, whether they were private property. The second question therefore tends to merge itself into the first. All of which we have set out more fully above.

We do not in the least consider that the case should have been regarded by the counsel for the College as one which they were sure to win. While we say that the preponderance of authority was in their favor, we think that this fact would not militate against a feeling on the part of counsel for the College of doubt as to the outcome, and a desire on their part to bring as many questions as possible before the Supreme Court. There are few new questions of law, coming up to be decided for the first time, in which, if there is a possibility of two views being taken, counsel are not justified in being doubtful as to the outcome, and especially if the case, like the present one, wears somewhat of a political aspect.

Mr. Shirley, in his book entitled the Dartmouth College Causes, has come to conclusions somewhat at variance with those which we have reached. We wish, therefore, to consider a few of his principal conclusions and the arguments by which they are supported.[58] Mr. Shirley's argument is

[58] Mr. Shirley's book is very diffuse. It is argumentative almost from cover to cover. A number of facts, statements and cases are

well summarized in Lodge's Life of Daniel Webster, from which we shall quote. Lodge's conclusions and criticisms on the case may be found in the following passages:

It now becomes necessary to state briefly the points at issue in this case, which were all fully argued by the counsel on both sides. Mr. Mason's brief, which really covered the whole case, was that the acts of the Legislature were not obligatory, 1, because they were not within the general scope of legislative power; 2, because they violated certain provisions of the Constitution of New Hampshire restraining legislative power; 3, because they violated the Constitution of the United States. In Farrar's report of Mason's speech, twenty-three pages are devoted to the first point, eight to the second, and six to the third. In other words, the third point, involving the great constitutional doctrine on which the case was finally decided at Washington, the doctrine that the Legislature, by its acts, had impaired the obligation of a contract, was passed over lightly. In so doing, Mr. Mason was not alone. Neither he nor Judge Smith nor Mr. Webster nor the court nor the counsel on the other side, attached much importance to this point. Curiously enough, the theory had been originated many years before, by Wheelock himself, at a time when he expected that the minority of the trustees would invoke the aid of the Legislature against him, and his idea had been remembered. It was revived at the time of the newspaper controversy, and was pressed upon the attention of the trustees and upon that of their counsel. But the lawyers attached little weight to the suggestion, although they introduced it and argued it briefly. Mason, Smith, and Webster all relied for success on the ground covered by the first point in Mason's brief. This is called by Mr. Shirley the "Parsons view," from the fact that it was largely drawn from an argument made by Chief Justice Parsons in regard to visitatorial powers at Harvard College. Briefly stated, the argument was that the college was an institution founded by private persons for particular uses; that the charter was given to perpetuate such uses; that misconduct of the trustees was a question for the courts and that the Legislature, by its interference, transcended its powers. To these general principles, strengthened by particular clauses in the Constitution of New Hampshire, the counsel for the college trusted for victory. The theory of impairing the obligation of contracts they introduced, but they did not insist on it, or hope for much from it. On this point, however, and, of course, on this alone, the case went up to the Supreme Court. In December, 1817, Mr. Webster wrote to Mr. Mason, regretting that the case went up on "one point only." He occupied himself at this time in devising cases which should raise what he considered the really vital points, and which, coming within the jurisdiction of the United States, could be taken to the Circuit Court, and thence to the Supreme Court at Washington. These cases, in accordance with his suggestion, were begun, but before they came on in the Circuit Court, Mr. Webster made his

seized upon to support the argument and a number of inferences are drawn which have seemed to the writer, from a general—not a minute—reading of the book to be erroneously drawn, but a careful criticism of the whole work will not be attempted.

great effort at Washington. Three quarters of his legal arguments were there devoted to the points in the Circuit Court cases, which were not in any way before the Supreme Court in the College vs. Woodward. So little, indeed, did Mr. Webster think of the great constitutional question which has made the case famous, that he forced the other points in where he admitted that they had no proper standing, and argued them at length. They were touched upon by Marshall, who, however, decided wholly upon the constitutional question, and they were all thrown aside by Judge Washington, who declared them irrelevant, and rested his decision solely and properly on the constitutional point. Two months after his Washington argument, Mr. Webster, still urging forward the Circuit Court cases, wrote to Mr. Mason that all the questions must be brought properly before the Supreme Court, and that, on the "general principle" that the State Legislature could not divest rights, strengthened by the constitutional provisions of New Hampshire, he was sure they could defeat their adversaries. Thus this doctrine of "impairing the obligation of contracts," which produced a decision in its effects more far-reaching and of more general interest than perhaps any other ever made in this country, was imported into the case at the suggestion of laymen, was little esteemed by counsel, and was comparatively neglected in every argument.[59]

The popular opinion of this case seems to be that Mr. Webster, with the aid of Mr. Mason and Judge Smith, developed a great constitutional argument, which he forced upon the acceptance of the court by the power of his close and logical reasoning, and thus established an interpretation of the Constitution of vast moment. The truth is, that the suggestion of the constitutional point, not a very remarkable idea in itself, originated, as has been said, with a layman, was regarded by Mr. Webster as a forlorn hope, and was very briefly discussed by him before the Supreme Court. He knew of course, that if the case were to be decided against Woodward, it could only be on the constitutional point, but he evidently thought that the court would not take the view of it which was favorable to the college.[60]

Mr. Lodge speaks of the legal argument made by Webster as strong, effective and lucid, but dry, cold and lawyerlike. He continues:

It gives no conception of the glowing vehemence of the delivery, or of those omitted portions of the speech which dealt with matters outside the domain of law, and which were introduced by Mr. Webster with such telling and important results. He spoke for five hours, but in the printed report his speech occupies only three pages more than that of Mr. Mason in the court below. Both were slow speakers, and thus there is a great difference in time to be accounted for, even after making every allowance for the peroration which we have from another source, and for the wealth of legal and historical illustration with which Mr. Webster amplified his presentation of the question. "Something was left out," Mr. Webster says, and that something which must have occupied in its delivery nearly an hour

[59] Lodge, Life of Webster, pp. 80–82.
[60] Ibid., pp. 97–98.

was the most conspicuous example of the generalship by which Mr. Webster achieved victory, and which was wholly apart from his law. This art of management had already been displayed in the treatment of the cases made up for the Circuit Courts, and in the elaborate and irrelevant legal discussion which Mr. Webster introduced before the Supreme Court. But this management now entered on a much higher stage, where it was destined to win victory, and exhibited in a high degree tact and knowledge of men. Mr. Webster was fully aware that he could rely, in any aspect of the case, upon the sympathy of Marshall and Washington. He was equally certain of the unyielding opposition of Duvall and Todd; the other three judges, Johnson, Livingston, and Story, were known to be adverse to the college, but were possible converts. The first point was to increase the sympathy of the Chief Justice to an eager and even passionate support. Mr. Webster knew the chord to strike, and he touched it with a master hand. This was the "something left out," of which we know the general drift, and we can easily imagine the effect. In the midst of all the legal and constitutional arguments, relevant and irrelevant, even in the pathetic appeal which he used so well in behalf of his Alma Mater, Mr. Webster bodly and yet skilfully introduced the political view of the case. So delicately did he do it that an attentive listener did not realize that he was straying from the field of "mere reason" into that of political passion. Here no man could equal him or help him, for here his eloquence had full scope, and on this he relied to arouse Marshall, whom he thoroughly understood. In occasional sentences he pictured his beloved college under the wise rule of Federalists and of the Church. He depicted the party assault that was made upon her. He showed the citadel of learning threatened with unholy invasion and falling helplessly into the hands of Jacobins and free-thinkers. As the tide of his resistless and solemn eloquence, mingled with his masterly argument, flowed on, we can imagine how the great Chief Justice roused like an old war-horse at the sound of the trumpet. The words of the speaker carried him back to the early years of the century when, in the full flush of manhood, at the head of his court, the last stronghold of Federalism, the last bulwark of sound government, he had faced the power of the triumphant Democrats. Once more it was Marshall against Jefferson,—the judge against the President. Then he had preserved the ark of the Constitution. Then he had seen the angry waves of popular feeling breaking vainly at his feet. Now, in his old age, the conflict was revived. Jacobinism was raising its sacreligious hand against the temples of learning, against the friends of order and good government. The joy of battle must have glowed once more in the old man's breast as he grasped anew his weapons and prepared with all the force of his indomitable will to raise yet another constitutional barrier across the path of his ancient enemies.

We cannot but feel that Mr. Webster's lost passages, embodying this political appeal, did the work, and that the result was settled when the political passions of the Chief Justice were fairly aroused. Marshall would probably have brought about the decision by the sole force of his imperious will. But Mr. Webster did a good deal of effective work after the arguments were all finished, and no account of the case would be complete, without a glance at the famous peroration with which he concluded his speech and in which he

boldly flung aside all vestige of legal reasoning, and spoke directly to the passions and emotions of his hearers.[61]

Mr. Lodge describes in the following manner the efforts which were made after the case was argued to create public sentiment in favor of the College:

> This work was pushed with increased eagerness after the argument at Washington, and the object now was to create about the three doubtful judges an atmosphere of public opinion which should imperceptibly bring them over to the college. Johnson, Livingston, and Story were all men who would have started at the barest suspicion of outside influence even in the most legitimate form of argument, which was all that was ever thought of or attempted. This made the task of the trustees very delicate and difficult in developing a public sentiment which should sway the judges without their being aware of it. The printed arguments of Mason, Smith, and Webster were carefully sent to certain of the judges, but not to all. All documents of a similar character found their way to the same quarters. The leading Federalists were aroused everywhere, so that the judges might be made to feel their opinion. With Story, as a New England man, a Democrat by circumstances, a Federalist by nature, there was but little difficulty. A thorough review of the case, joined with Mr. Webster's argument, caused him soon to change his first impression. To reach Livingston and Johnson was not so easy, for they were out of New England, and it was necessary to go a long way round to get at them. The great legal upholder of Federalism in New York was Chancellor Kent. His first impression, like that of Story, was decidedly against the college, but after much effort on the part of the trustees and their able allies, Kent was converted partly through his reason, partly through his Federalism, and then his powers of persuasion and his great influence on opinion came to bear very directly on Livingston, more remotely on Johnson. The whole business was managed like a quiet, decorous political campaign.[62]

The statement thus made as to the weakness of the case of the College in the opinion of its counsel seems greatly exaggerated. In the first place, the argument made by computing the number of pages devoted by counsel in their arguments to the consideration of the "contracts clause," and then concluding that the rest of the arguments of counsel were irrelevant is utterly worthless. As we have shown, a charter could only be established as a contract under the "contracts clause" by showing that it was regarded at common law as a grant of a private property right. The three headings of Mason's argument, which

[61] Ibid., pp. 86–88.
[62] Ibid., pp. 92–93.

Webster also used, were mere frames on which to set the discussion of the nature of the corporate franchise as a piece of property. Had Webster omitted the first two headings and retained only the heading that the acts in question impaired the obligation of a contract, only about six pages, in which he considers in detail specific clauses of the New Hampshire constitution, of his whole forty-nine page argument would have become irrelevant. The rest would not only have been relevant, it would have been absolutely essential. The inference based upon the page calculation is, therefore, unfounded.

Answering another of the points made, we would say that we have not discovered that Webster ever stated that he regarded the case as a "forlorn hope." That seems to be an inference of Mr. Shirley. The expressions found in Webster's correspondence simply amount to saying that he is sorry the case went up on a single point and would like to bring a case in the federal courts so as to bring the whole case before the Supreme Court.[63]

[63] The following are the quotations which Mr. Shirley gives from Webster's correspondence.

"You are aware that in the college cause the only question that can be argued at Washington is whether the recent acts of the Legislature of New Hampshire do not violate the Constitution of the United States. This point, though we trust a strong one, is not perhaps stronger than that derived from the character of these acts compared with the Constitution of New Hampshire. It has occurred to me whether it would not be well to bring an action which should present both and all our points to the Supreme Court . . ."

"It is our misfortune that our cause goes to Washington on a single point. I wish we had it in such shape as to raise all the other objections as well as the repugnancy of these acts to the Constitution of the United States."

"I am sorry our college cause goes to Washington on one point only. What do you think of an action in some court of the United States that shall raise all the objections to the act in question."

"I am glad a suit is to be brought [in the federal courts]."

"The question which we must raise in one of these actions, is whether by the general principles of our governments the State Legislatures be not restrained from divesting vested rights. This, of course, independently of the constitutional provision respecting contracts. On this question I have great confidence in a decision on the right side. This is the proposition with which you began your argument at Exeter and which I endeavored to state from your minutes at Washington." Shirley, pp. 5, 6.

The fact that the Justices of the Supreme Court were unable to reach a conclusion the day after the case was argued is sometimes referred to as warranting the inference that a number of the Justices were at that time unfavorable to the College, and had to be brought around to another way of thinking, either by outside influence or by the force of the Chief Justice's will, but the inference seems rather extreme. The principal source of information as to the position of the Justices upon the case at that time is found in Webster's letter to Smith, of March 18, 1818. It will be noticed that the statement is not by any means as positive as Mr. Lodge's statement upon the same subject. Webster wrote:

> I have no accurate knowledge of the manner in which the judges are divided. The chief and Washington, I have no doubt, are with us. Duval and Todd are perhaps against us; the other three holding up. I cannot much doubt but that Story will be with us in the end, and I think we have much more than an even chance with one of the others.[64]

Again, much is made of the conversions of Story and Kent, who had originally held opinions in favor of the new trustees. We do not marvel at Story's conversion, but we are surprised at the fact of his ever having held another view, considering the position which he had taken four years before, in the case of Terrett v. Taylor, in regard to the sanctity of corporate franchises.

Kent offers a very reasonable explanation of his change of opinion. In a letter to Mr. Marsh, he writes that he took a trip through New Hampshire to recruit his spirits, stopped off at Hanover where he met a friend who introduced him to the president and professors of the university, but did not meet the officers of the college:

> Being on the spot and witnessing the college sessions I was anxious to know something of the controversy, though nothing was

[64] Mr. Shirley gives the following account from The National Intelligencer: "On Friday morning [March 13, 1818] the chief justice observed that the judges conferred on the cause between the Trustees of Dartmouth College and William H. Woodward. Some of the judges have not come to an opinion on the case. Those of the judges who have formed opinions do not agree. The cause must therefore be continued until next term." Shirley, p. 238.

said on the subject by the gentlemen to whom I was introduced. I had often casually heard the subject mentioned but knew nothing of its merits. After some search I was enabled to purchase the opinion of the Supreme Court of New Hampshire as delivered by the Chief Justice and read it the next day on my return to Windsor. That opinion furnished me with the few scanty facts I possessed in regard to the great constitutional question and it appeared to me on a hasty perusal of it that the legislature was competent to pass the laws in question, for I was led by the opinion to assume the fact that Dartmouth College was a public establishment for purposes of a general nature. I knew nothing nor do I now know anything material in respect to the policy or motives of the laws or what were the real inducements to pass them.

But I will declare to you with equal frankness that the fuller statement of facts in Mr. Webster's argument in respect to the original reasons and substance of the charter of 1769 and the sources of the gifts gives a new complexion to the case and it is very probable that if I was now to sit down and seriously study the case with the facts at large before me that I should be led to a different conclusion from the one which I had at first formed. But my hasty impressions one way or the other are not worth mentioning for I deem them of no value. I have merely stated those incidents to show how very acceptable is the argument you sent me.

Mr. Shirley comments:

As has already been suggested, the opinion of Judge Richardson contained a statement of facts; and the pamphlet produced by Kent gave precisely the same information as the State report. Probably no person was ever misled by the State report—except (?) Chancellor Kent. Strange as it may seem, Daniel Webster and Jeremiah Mason never discovered it.[65]

We cannot but regard such a comment as disingenuous. The opinion of Richardson did give the facts very scantily and made no mention of the history of the Indian school, or the fact that Dr. Wheelock was named as the founder; and it is easily understandable how an able presentation of one side of a case will draw assent from one not already versed in the particular question under discussion, when a presentation of the opposite side might have produced an entirely different result.

Mr. Shirley does not give any authorities for his statement that Webster introduced the political aspect of the case into his argument, but the probabilities would certainly be that he did so. Mr. Lodge's very interesting picture of the nature of that part of the speech and its effect on Mar-

[65] Shirley, The Dartmouth College Causes, pp. 263–264.

shall is probably not far wrong. It seems, nevertheless, that this feature of the case has been over-emphasized because the soundness of the decision from the legal standpoint has been overlooked.

Given the doctrine of Fletcher v. Peck, the questions in the College case were: Was a charter grant a grant of property? Were charitable or educational institutions, public institutions? These questions were to be answered by examining the common law and then by subjecting it to such modifications as it had received in its adaptation to the needs of this country. The English precedents rather clearly supported the court upon both of these questions. The court might have said that the English doctrines were unsuited to this country, and particularly might they have said that these educational institutions were public institutions. Here, if anywhere, their political opinions may have had some play, but not, perhaps, as much as has often been thought.[66]

Our view of Fletcher v. Peck is that here, also, the weight of authority upon the technical questions involved supported the opinion of the majority. But any judgment upon this case must be subject to a review of the evidence which was available to the court as to whether or not it was the intention of those who framed and adopted the Constitution that the "contracts clause" should extend to protect the contracts of the States, which is a matter we shall shortly consider. Of the two cases, Fletcher v. Peck, took far the larger step toward the position at which the court finally arrived. It established the principle of which Dartmouth College v. Woodward was merely the application, and it was with this conception in mind, undoubtedly, that Marshall admitted that it was quite possible that those who adopted the Constitution might never have had in contemplation the precise case of grants of corporate franchises.

The College case has, however, been used as the authority

[66] It should be noted that Justice Duval dissented, but as he wrote no opinion his reason for so doing cannot be known.

for sustaining all other franchise grants as well as grants of corporate franchises, because these secondary franchises were almost always found in the charters themselves, and were hence considered contracts without question. The effect of the ruling in the College case is now and has for some time been very largely nullified by the reservation, in the grants of corporate franchises, of the right to alter, amend or repeal them, to which the vast majority of existing charters are, without doubt, subject. Its effect is still noticeable in the decisions relating to secondary franchises, such as the franchises in city streets of public service corporations, which are often not subject to this reserved right of repeal.

In connection with the College case, must be always borne in mind the modifying doctrines of the Charles River Bridge case,[67] that state grants are to be construed strictly in favor of the state; of the so-called Granger cases,[68] that businesses affected with a public interest are subject to legislative regulation and control; of The West River Bridge Co. v. Dix[69] that franchises are always taken subject to the exercise of the power of eminent domain on the part of the state; and of Stone v. Mississippi,[70] and other cases, that the police power cannot be alienated. All these doctrines were undoubtedly felt to be necessary limitations upon the operation of the principles of the College case. How far they were actually necessitated would depend upon how general the practice had become, at the time these decisions were rendered, of reserving the right to repeal charters—a question which we are not prepared to answer.

The effect of the College case upon the body politic generally is, however, a question upon which we have made no special investigation and which is indeed most difficult of estimation. It may be said that, with the limitations which have been affixed to the doctrine, and with the reservation

[67] 11 Pet. 420 (1837).
[68] Munn v. Illinois, 94 U. S. 113 (1876), and the cases following.
[69] 6 How. 507 (1848).
[70] 101 U. S. 814 (1879).

of the right of repeal, now so common, there is not much ground for complaining of its being burdensome, although, as said before, it is still effective in the case of many secondary franchises. There is undoubtedly much truth in Mr. Cotten's remark: "That is the great effect, the great point of the case,—that it fixed the popular as well as the legal mind in favor of the stability of corporate enterprise and securities."[71]

When we speak of the limitations which have been affixed to the College case we do not mean to infer that these limitations are necessarily to be considered as deviations from its doctrine. That is quite a different question, and one which we shall not attempt to answer. Logically speaking, there is no incompatibility between the doctrines of The Charles River Bridge case, the Granger cases, The West River Bridge Co. v. Dix and Stone v. Mississippi, and the

[71] Marshall's Decisions, ed. Cotten, p. 349. Sir Henry Maine has said: "I have seen the rule which denies to the several states the power to make any laws impairing the obligation of contracts criticised as if it were a mere politico-economical flourish; but in point of fact there is no more important provision of the Constitution. Its principle was much extended by a decision of the Supreme Court, which ought now to interest a large number of Englishmen, since it is the basis of the credit of many of the great American railway incorporations. But it is this prohibition which has in reality secured full play to the economical forces by which the achievement of cultivating the soil of the North American continent has been performed, it is the bulwark of American individualism against democratic impatience and socialistic fantasy." Maine, Popular Government (Essay IV.), p. 247. Mr. John F. Dillon has said: "The doctrine of the Dartmouth College case as applied by the Supreme Court in its various decisions, is not only sound, but has been one of the chief causes of our individual and national prosperity." John Marshall, ed. Dillon, vol. i, p. 370. Governor Baldwin says in his American Political Institutions at p. 121: "So did the little phrase impair the obligation of contracts,—like the genius of some Arabian tale at the touch of the magic wand of Chief Justice Marshall, rise and spread into the form of that invincible champion of chartered franchises by which the whole theory of American corporations was to be revolutionized once and again. And so, by means perhaps less direct, but no less controlling, has a new meaning been read into many a provision of statute or constitutions, by public opinion and the lapse of time,—a meaning by which the law, it may be, at last ceases to protect and begins to oppress society. Has not this been the history of the constitutional guaranty now under consideration?" It is, however, very difficult to gauge this moral effect of the case.

doctrine of the case under consideration. The question is, Was there a deviation in spirit between these cases?

It may be noted that the rule, that the power to legislate as to the forms of administering justice and as to the duties and powers of the courts was inalienable, was laid down in Bank of Columbia v. Okely,[72] decided at the same term of court as Dartmouth College v. Woodward, so that it is not apparent that the later rulings as to the inalienability of the power of eminent domain and of the police power were opposed to the spirit of the College case.

As both the Charles River Bridge case and the Granger cases claim to be merely restatements of common law doctrine, it would require a careful examination of these decisions to see how far they were supported by the common law. If they really were supported by common law precedents it would not seem correct to say that they were deviations from the spirit of the College case. Story's own view of the Bridge case and his voucher for Marshall's[73] affords strong presumption, however, that this case was really contrary to the spirit which animated the justices in the College case, and that the result reached was largely due to a changed public opinion reflected in the new bench.

The case of Illinois Central v. Illinois R. R. Co.[74] is an interesting one. It may probably be said to be a departure from the spirit of the College case. Here it was held that a grant to a railroad company of an area of more than a thousand acres of the submerged land in the harbor of Chicago was merely a revocable license. The extent to which the decision of the majority was based upon expediency is seen from their admission that small parcels of submerged land such as are necessary for the construction of docks and "which when occupied do not substantially impair the public interest in the lands and waters remaining" might be granted. So submerged shoals and flats may be ceded. The minority come rather close to the truth when

[72] 4 Wheat. 235, 245.
[73] 1 Watson on the Constitution, p. 810.
[74] 146 U. S. 487.

Chief Justice Doe makes the further criticism upon the College case that even had the charter been granted by the legislature of New Hampshire instead of by the King of England, it could not have constituted an irrepealable contract for, inasmuch as the legislature's power of law-making had been merely delegated by the State, that body could not contract away this power. But if it be conceded that the States can contract, it would seem to be very narrow and technical reasoning to contend that the power to contract is not granted to the legislature under the ordinary grant of legislative power found in the State constitutions.

Again, Chief Justice Doe suggests that, under the doctrine of the strict construction of state contracts, which has been elaborated since the College case, upon the authority of the Charles River Bridge case, it can not be said that a grant of corporate franchises contains a contract not to repeal them, when the only way in which such a contract can be found is by implying one.

It may be that such a conclusion is entirely compatible with a logical application of the rule of strict construction. But the rule of strict construction is not always applied with logical precision. The court is inclined to protect those who have expended large sums of money on the faith of legislative grants, and has adhered to the principle that when the legislature grants franchises upon the faith of which large sums of money are spent, although such franchises are not expressly stated to be irrevocable, and though no time is fixed for the duration of such franchises, never-

porators. The differences between an enabling statute and a charter are, however, mainly differences in form. A charter as well as an enabling statute prescribes rules for conduct; the difference being that these rules in the case of a charter have a more limited application. And as an enabling statute, as well as a charter, proffers terms and facilities of action which are accepted by the corporators by filing their articles of association, only in the case of an enabling statute the terms are offered to the citizens of the state at large, any sufficient number of whom may accept them and incorporate themselves by complying with them." Taylor, Corporations, pp. 432–433. It is difficult to perceive whether Mr. Taylor's idea is that no corporate charters are contracts or only that corporations incorporated under the general law have no contract rights as against the state."

thless there is a condition implied in them that the legislature will not revoke its grant. If Justice Doe's position were correct, no public utility franchises would be contracts unless a specific period of existence was named in them, and possibly not then, if they are not expressly made irrevocable. But the Supreme Court has recently held that grants of franchises in the streets of cities to public utility companies, under which large sums of money are to be spent, are, although not expressly made irrevocable, and although their duration is not specified, of perpetual duration.[78]

It has already been remarked, in the part of this chapter in which the general question of the power of the States to contract was considered, that there are no very clear logical lines to be drawn between contracts which the States may make and those which they may not make. The question may almost be said to be one of policy. Thus much room is left for difference of opinion upon this matter. It would seem that a line may properly be drawn somewhere between contracts concerning property, on the one side, and contracts concerning essential governmental powers, on the other. Practically every one will agree that it now seems rather incongruous to consider the taxing power as a subject of contract. It would seem much more reasonable to place it along with the power of eminent domain, the police power, and the power of administering justice, as not capable of being made the subject of contract. Public service franchises have uniformly been regarded as in the nature of property, and hence as the subject of contract. Contracts exempting public service corporations from rate regulation are close to the line. Another close case is that of Illinois Central R. Co. v. Illinois,[79] where it was held that the State could not make irrevocable grant of land covered by navigable waters, if it will substantially impair the public interest in the lands and waters remaining.

[78] Owensboro v. Cumberland Telephone Co., 230 U. S. 58; Old Colony Trust Co. v. Omaha, 230 U. S. 100; Boise Water Co. v. Boise City, 230 U. S. 84.

[79] U. S. 387.

It remains to review the proceedings of the Constitutional Convention of 1787, of the State conventions, and the other historical data concerning the adoption of the "contracts clause." Justice Miller, in his lectures on the Constitution has said:

> It has seemed probable to many judges and lawyers who have considered this clause of the Constitution that it was not designed by the framers of that instrument to do anything more than protect private contracts, those between individuals and those between individuals and private corporations, that is, not municipal corporations, but those organized for purposes of profit; and if it were now an original question, it is by no means certain but that this would be held to be the sound view of it. But those eminent men who at an early day had the duty of defining the meaning of this provision thought otherwise.[80]

[80] Miller on the Constitution, p. 555.

CHAPTER V

THE "OBLIGATION OF CONTRACTS CLAUSE" AS VIEWED BY THE FRAMERS OF THE CONSTITUTION

Heretofore we have been engaged in a more or less technical examination of the "contracts clause" and the decisions construing it. We have been able to proceed thus far without considering the historical surroundings of the clause, because the decisions themselves were based on technical, rather than historical considerations. It remains for us, however, to review the proceedings in the Constitutional Convention and the other available data, to check up, as it were, the results already reached. The purpose will be twofold: to ascertain whether the information at the disposal of the court when the important decisions were made was such as should have assured a different result from that actually reached; secondly, to ascertain, as a matter of interest, what further opinions, undisclosed at the time of the rendering of the decisions before mentioned, were held by the "Fathers" as to this clause.

In truth the court had little in the way of historical information to assist it in laying out the field to be covered by the "contracts clause." The intentions of the Convention itself could not be ascertained, for the journal and debates were not published until after the important cases on this subject had been decided. The members of the Convention, moreover, had been pledged to secrecy.[1] Was there then a clear conception of the meaning of the clause prevailing generally throughout the land, at the time the Constitution was adopted?

[1] 1 Farrand, The records of the Federal Convention, pp. xi, xiv. The journal was published in 1819. Various minutes were later published from time to time, and finally Madison's Minutes of the debates were published in 1840.

Turning, first, to the Federalist, the primary source of information on questions such as these and which, doubtless, acted as the most potent agency for moulding public opinion on matters of this kind, we find that the only treatment of the clause is in Number 44, at the hands of Madison. He there says:

> Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights, and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."[2]

In the discussion of the first clause of section 10 in the Virginia convention Patrick Henry feared that it might require the States to pay the continental paper money in full. Speaking of *ex post facto* laws and laws impairing the obligation of contracts, he said: "The expression includes public contracts, as well as private contracts between individuals. Notwithstanding the sagacity of the gentleman, he cannot prove its exclusive relation to private contracts."[3] The answer given to this contention was that Congress and not the States had contracted to pay this debt. Governor Randolph called Henry's attention to the fact that Congress was only forbidden to pass *ex post facto* laws which re-

[2] Federalist, ed. Ford, p. 297.
[3] 2 Elliott's Debates, 474.

ferred only to criminal matters. He also said:

> I am still a warm friend of the prohibition, because it must be promotive of virtue and justice, and preventive of injustice and fraud. If we take a review of the calamities which have befallen our reputation as a people, we shall find they have been produced by frequent interferences of the state legislatures with private contracts. If you will inspect the great cornerstone of republicanism, you will find it to be justice and honor.[4]

It will be noticed that Randolph nowhere denies Henry's contention that the "contracts clause" refers to the contracts of the States as well as to those between individuals.

In the debate in the North Carolina convention the question was raised, whether the clause had reference to the contracts of the States as well as to contracts made between individuals. W. R. Davie, a member of the Constitutional Convention, answered it in the negative, saying:

> Mr. Chairman, I believe neither the 10th section, cited by the gentleman, nor any other part of the Constitution, has vested the general government with power to interfere with the public securities of any state. I will venture to say that the last thing which the general government will attempt to do will be this. They have nothing to do with it. The clause refers merely to contracts between individuals.[5]

There does not appear to have been any debate over the clause in a single other State convention, and the only other mention of it is to be found in Sherman's and Ellsworth's letter to the governor of Connecticut, and in Luther Martin's "Genuine Information" to the Maryland Legislature. Sherman and Ellsworth say:

> The restraint on the legislatures of the several states respecting emitting bills of credit, making anything but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interests of foreigners, as well as of the citizens of different states may be affected.[6]

Martin said:

> The same section also puts it out of the power of the States to make any thing but gold or silver coin a tender in payment of debts,

[4] Ibid., 478.
[5] 3 Farrand, Records of the Federal Convention, p. 349.
[6] Ibid., vol. iii, p. 100.

or to pass any law impairing the obligations of contracts. I considered, Sir, that there might be times of such great public calamities and distress, and of such extreme scarcity of species, as should render it the duty of a government, for the preservation of even the most valuable part of its citizens, in some measure to interfere in their favor by passing laws totally or partially stopping the courts of justice, or authorizing the debtor to pay by instalments or by delivering up his property to his creditors at a reasonable and honest valuation. The times have been such as to render regulations of this kind necessary in most or all of the States, to prevent the wealthy creditor and the moneyed man from totally destroying the poor though even industrious debtor. Such times may again arrive. I therefore voted against depriving the States of this power, a power which I am decided they ought to possess, but which, I admit, ought only to be exercised on very important and urgent occasions. I apprehend, Sir, the principal cause of complaint among the people at large is the public and private debt with which they are oppressed, and which in the present scarcity of cash, threatens them with destruction, unless they can obtain so much indulgence in point of time, that by industry and frugality they may extricate themselves.[7]

A provision in the Northwest Ordinance, passed by Congress in 1787 before the work of the convention was finished, may also be noticed on account of the similarity of the language used and, as well, on account of the differences. The clause reads as follows:

> And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud previously formed.

This was all the documentary evidence that the court could have had in making its important decisions as to the meaning to be attributed to the "contracts clause." Of course it is true that the State laws passed during the existence of the Confederation which had impaired the obligation of private contracts by issuing depreciated paper currency and making it legal tender, allowing debts to be satisfied in property or paid in installments, and hindering creditors in their efforts to obtain redress,[8] were necessarily matters of common knowledge. Considering then the particular evils which seem to have inspired the adoption of the

[7] Ibid., vol. iii, p. 214.

[8] See Madison's introduction to the debates, 3 Farrand, Records of the Federal Convention, p. 548.

clause, the statement of Davie in the North Carolina convention and the general trend of Martin's argument as it was found in his Genuine Information (although there is no means of knowing whether the latter two sources of information were actually presented to the court), an inference might have been drawn that only private contracts were intended to be protected.

Against this may be placed several important considerations. The first and most important of all—one that we have already had occasion to call attention to and which, we think, has been too often overlooked in considering the course of the early decisions upon this clause of the Constitution—is that the most eminent jurists of the day, both at the time of the convention and for some years afterwards, were firm adherents to the doctrine of natural law. They were familiar with the theory of the natural obligation of contracts; they were familiar with the theory of the social compact; and the idea of a state's being bound by its contract must have been a perfectly natural one to them.

Jurists imbued with the theories of Austin, to whom the idea of the state's being obligated by a contract made with one of its citizens has always been an incongruous one, are apt to feel that the court was legislating in a most active way when it declared that the contracts of the States were included within the operation of the "contracts clause." They say that, what with the jealousy exhibited by the States on all occasions and with the very narrow margin by which the Constitution was actually carried through, it is inconceivable that it would have been adopted had the meaning of the "contracts clause," as it later developed, been fully explained.

We have already suggested, as a partial answer, that the theory of natural law, which recognized the contracts of states equally with those of individuals, was generally accepted at that time. Several proofs of this may be adduced. James Wilson—member of the Constitutional Convention,

the reputed author of the "contracts clause,"[9] one of the most influential men of his day, "reputed among the foremost in legal and political knowledge,"[10] and later a justice of the Supreme Court of the United States—published in 1792 a number of lectures which he had delivered to a body of students. The following extracts from the lectures will illustrate the views which he held. "Sir William Blackstone," says Wilson, "tells us that the original of the obligation which a compact carries with it, is different from that of a law. The original of the obligation of a compact we know to be consent: the original of the obligation of an act of parliament we have traced minutely to the very same source." Again, he says, page 190: "Consent is the sole principle on which any claim, in consequence of human authority, can be made upon one man by another. Exclusively of the duties required by the law of nature, I can conceive of no claim that one man can make upon another but in consequence of his own consent." Naturally, to such a one, the spectacle of a state's being bound by a contract was perfectly congenial; and so we find: "It [the state] is an artificial person—it has its obligations and it has its rights. It may acquire property distinct from that of its members, it may incur debts, to be discharged out of the public stock, not out of the private fortunes of individuals: it may be bound by contracts and for damages arising *quasi ex contractu*."[11] It may also be mentioned that, in 1785, he had published an argument in opposition to a bill which had been introduced in the Pennsylvania Legislature for the purpose of repealing the charter granted by the State of Pennsylvania to the Bank of North America, in which he argued that the charter was a contract and that the legislature, therefore, had no power to repeal it.[12]

[9] See argument in Sturges v. Crowninshield, 4 Wheat. 122.

[10] 3 Farrand, Records of the Federal Convention, p. 91.

[11] 1 Wilson's Works, ed. Andrews, p. 183. It should be stated that he had made the argument as counsel for the bank before the legislature.

[12] 2 Wilson's Works, ed. Andrews, p. 565.

The doctrine which he then put forward is summed up in this form: "For these reasons, whenever the objects and makers of an instrument, passed under the form of a law, are not the same, it is to be considered as a compact and interpreted according to the rules and maxims by which compacts are governed."[13]

A brief statement from Merriam's American Political Theories will show the current political theory of revolutionary and post-revolutionary times. That writer says:[14]

> By way of summary, it may be said that the leading doctrines of the revolutionary period were those of what is known as the *Naturrecht* school of political theory. They included the idea of an original state of nature, in which all men are born politically free and equal, the contractual origin of government, the sovereignty of the people and the right of revolution against a government regarded as oppressive. . . . It will be observed that the spirit of this reasoning was decidedly individualistic. The starting point was the independent and sovereign individual endowed with a full set of natural rights. He consents to give up a part of these natural rights to form a government by means of a compact.

Not only was this natural law and social compact theory an accepted philosophical doctrine; it is often found stated in the opinions of the courts as well. Thus, in Calder v. Bull,[15] decided in 1796, we find a polished and elaborate statement of it by Justice Chase. Then, in the early case of Vanhorne's Lessee v. Dorrance,[16] decided in 1795, we find Justice Patterson of the Supreme Court contemplating with equanimity the possibility, not only of an act of the legislature's constituting a contract, but of its constituting a contract within the meaning of the "contracts clause." In answer to an argument of counsel to the effect that the act in question impaired the obligation of a contract, he merely says: "But if the confirming act be a contract between the Legislature of Pennsylvania and the Connecticut settlers, it must be governed by the rules and regulations which pervade all cases of contracts and if so, it is clearly void."

[13] 1 Wilson's Works, ed. Andrews, p. 565.
[14] American Political Theories, pp. 94-95.
[15] 3 Dall. 386.
[16] 2 Dall. 304.

The proceedings in the Virginia convention were favorable.

The language of the Federalist, which we have already quoted, was very broad and general. It is not specific, of course, but the very fact was one to which the court did, and we think rightly, attach considerable weight. Justice Johnson, who dissented in Fletcher v. Peck, was ready to admit that the clause applied to the contracts of the States. Speaking of this clause, he said: "There is reason to believe, from the letters of Publius, which are well entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislature. Whether the words 'acts impairing the obligation of contracts' can be construed to have the same force as must have been given to the words 'obligation and effect of contracts' is the difficulty in my mind." In other words, he contended only that a conveyance was not a contract.

Taking the broad general language of the clause, taking the equally general language of the Federalist, applying the principles of natural law, to which he adhered and by which, rather than by the common law, the wording of the clause was made intelligible, Chief Justice Marshall made his decision that the contracts of the States were protected from impairment. This decision was generally acquiesced in at the time and for sometime afterwards. Even the Justices who, in Ogden v. Saunders, disagreed with the Chief Justice, and refused to go the full length of the natural law theory, admitted that it was natural law which chiefly created the obligation of the contracts of the States themselves. It is by no means certain, therefore, that the Chief Justice was not justified in his belief that the framers of the Constitution intended the meaning which he gave. And it is difficult to say that he should have argued that the clause, so construed, would have caused the rejection of the Constitution and hence should not be construed according to what was, to him, the plain meaning of its terms. It remains to examine the proceedings of the convention itself.

It was not until slightly over two weeks before the close of the Convention that we find any reference to a provision relating to contracts. On Tuesday, August 28, Rufus King moved to add to the prohibitions upon the States, in the words of the Ordinance of Congress establishing new States —the Northwest Ordinance—a prohibition on the States to interfere in private contracts. Gouverneur Morris thought this would be going too far, as there are a thousand laws, he said, relating to the bringing and the limitation of actions which affect contracts. James Wilson was in favor of King's motion. Madison admitted that inconveniences might arise from such a prohibition, but thought these overbalanced by the utility of it. He conceived, however, that a negative on the State laws could alone secure the desired effect. Mason thought this carrying restraint too far, and thought that cases might happen where interference would be necessary, mentioning the case of statute of limitations. Wilson replied: "The answer to these objections is that retrospective interference only will be prohibited." Madison asked if that was not already done by the prohibition of *ex post facto* laws. This ended the debate, for the prohibition was voted simply against *ex post facto* laws.[17] The next day Dickinson reported that, on consulting Blackstone, he found that the term "*ex post facto*" related to criminal cases only and would not, therefore, prevent the States from passing retrospective laws in civil cases. The draft was sent to the Committee of Style, however, on September 10, without any change being made. It was upon its return from this committee on September 12 that the "contracts clause" first made its appearance, the prohibition being directed to the passage of any laws "altering or impairing the obligation of contracts." An amendment, striking out the word "altering" was passed on the 14th of September, but a motion by Gerry, who "entered into observation inculcating the importance of public faith and the propriety of the restraint put on the states from impairing the obligation

[17] Madison has it in his notes, "retrospective" law.

of contracts," to put Congress under the same restraint was not seconded. There is, also, a note found upon Mason's copy of the draft of February 12, to the effect that a motion to strike out "*ex post facto* laws," and, after the words "obligation of," to insert "previous" was refused. This motion is not found in the journal or in any other of the records of the debates.[18]

It is very plain that the convention had in mind only retrospective laws as impairing the obligation of contracts, and it is almost equally plain that they had in mind only the contracts of private individuals.

[18] The history of this clause in the Convention is accurately described by Meigs in his Growth of the Constitution, pp. 182–186. Its history may easily be traced in Farrand's authoritative Records of the Federal Convention, by referring to the index which gives the places of reference of each clause. A reference to vol. ii, pp. 448, 449, should be added.

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